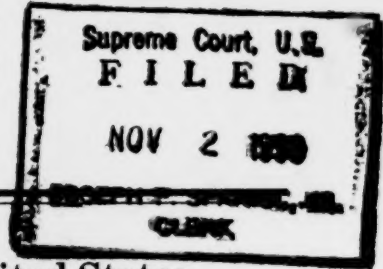


90-714

No.



In The
Supreme Court of the United States
October Term, 1990

RITAELEN M. MURPHY, et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

Petition for Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, without legislative authority, the executive branch, administrative agencies, and private citizens can utilize a consent decree to rewrite an express statutory scheme duly enacted by the Illinois General Assembly?

2. Whether the judicial authority of the District Court extends through federalism into state sovereignty and allows it to enter a consent decree in violation of the exclusive legislative prerogative of the Illinois General Assembly?

3. Whether *Missouri v. Jenkins* should be reconsidered and limited in the scope of its application?

4. Whether, pursuant to the original intent of and the principles intended in the United States Constitution and the Illinois State Constitution, the State of Illinois can both acknowledge and establish an unborn child's personhood from conception and protect her life and liberty interests?

5. Whether unborn children, as incompetents, have the same protectable life and liberty interests as Nancy Cruzan in *Cruzan v. Director, Missouri Department of Health*?

6. Since the constitutional validity of Section 1 of the Illinois Abortion Act, establishing the personhood of the unborn child and acknowledging the unborn child as a human being, turns on the validity of *Roe v. Wade*, is this duly enacted statutory provision constitutionally valid?

7. Should *Roe v. Wade* be explicitly overruled?

8. Whether the *Dred Scott v. Sandford* decision should be recognized as error and explicitly overruled ab initio?

PARTIES TO THE PROCEEDINGS

Petitioners-Plaintiffs-Appellants:

Ritaellen M. Murphy, who has a Bachelors of Science in Nursing, is a practicing Registered Nurse, a Critical Care Registered Nurse, a Trauma Nurse Specialist, an advanced Cardiac Life Support Instructor, a consultant to the American Heart Association, a member of the Advanced Cardiac Life Support-Target Action Group Committee, a Pediatric Advanced Life Support Instructor, a Cardiac Pulmonary Resuscitation affiliate facility member, and the Director of Life Support Services (a division of the Emergency Medical Services Department) at Loyola Hospital, which is a Level I Trauma Center in Maywood, Illinois. She is certified in Mobile Intensive Care Nursing. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Penny R. Greenwood, who has a Bachelors of Science in Psychology, is a practicing Registered Nurse, a Trauma Nurse Specialist, former Department Head of Out-Patient Surgery, and a member of the emergency room medical staff at Hinsdale Hospital in Hinsdale, Illinois. She is certified both in Advanced Cardiac Life Support and in Cardiopulmonary Resuscitation. She is experienced in hospital obstetrical care. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Petitioners-Proposed Intervenors-Appellants:

Kenneth M. Reed, as an expectant father, proposed intervention on behalf of his unborn child and on behalf of all

other Illinois unborn children.

Mark I. Aughenbaugh, as an expectant father, proposed intervention on behalf of his unborn child and on behalf of all other Illinois unborn children.

Respondents-Plaintiffs-Appellees:

Richard M. Ragsdale, M.D., is an experienced abortionist, performing over 3,500 abortions per year. He filed suit on behalf of all physicians and surgeons who perform or desire to perform abortions in the State of Illinois.

Northern Illinois Women's Center is an Illinois corporation performing abortions in Rockford, Illinois.

Margaret Moe is a registered nurse, who is the sole owner and executive director of a medical facility, which desires to perform abortions in Cook County, Illinois.

Sarah Roe and Jane Doe are women who have had abortions in the past and may desire abortions in the future. They filed suit on behalf on all women of child-bearing age who desire or may desire an abortion sometime in the future.

Respondents-Defendants-Appellees:

Bernard J. Turnock, M.D., is the Director of the Department of Public Health of the State of Illinois and was sued in his official capacity. He is responsible for the enforcement of the Ambulatory Surgical Treatment Center Act and the promulgation and enforcement of regulations under that Act, and has certain administrative responsibilities under the Health Facilities Planning Act.

Neil F. Hartigan was sued in his official capacity as

Attorney General of the State of Illinois. He is charged with the defense of challenges to the Medical Practice Act, the Ambulatory Surgical Treatment Center Act, the Abortion Act and the Health Facilities Planning Act, and their respective regulations, throughout the State of Illinois. In addition, as chief legal officer of the State of Illinois, the Attorney General represents the directors of state agencies in their enforcement activities, and upon referral by these agencies, has certain enforcement responsibilities on behalf of these agencies.

Richard M. Daley was the State's Attorney of Cook County and was sued in his official capacity, and as representative of the defendant class of all state's attorneys of the one hundred and one other counties of the State of Illinois. He was succeeded in office by **Cecil Partee**, the present Cook County State's Attorney. Mr. Partee was substituted as the named defendant and as the representative of the defendant class of state's attorneys. The state's attorneys are the chief legal officers of the counties and represent the People of the State of Illinois in the enforcement of criminal statutory provisions, including those found in the Abortion Act.

Gary L. Clayton was the director of the Department of Registration and Education and was sued in his official capacity. He was ultimately succeeded by **Kevin K. Wright**, the Director of the successor agency, the Department of Professional Regulation. **Steven F. Selcke** and **Robert C. Thompson** had served as agency directors between the respective terms of office of Mr. Clayton and Mr. Wright. All four individuals had previously been empowered to implement, administer, and enforce the Medical Practice Act. Mr. Wright is presently so empowered.

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**In The
Supreme Court of the United States
October Term, 1990**

RICHARD M. RAGSDALE, M.D., etc., et al.,

Respondents-Plaintiffs-Appellees,

and

RITAELEN M. MURPHY, et al.,

Petitioners-Plaintiffs-Appellants,

vs.

BERNOCK J. TURNOCK, M.D., etc., et al.,

Respondents-Defendants-Appellees,

and

KENNETH M. REED, et al.,

Petitioners-Proposed Intervenors-Appellants.

**Petition for Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI



OPINIONS BELOW

***Ragsdale v. Turnock* Present Petition For Certiorari**

Ragsdale v. Turnock is currently pending before the Court of Appeals for the Seventh Circuit. The present petition for certiorari is being brought before rendition of judgment. The August 20, 1990 order of the Court of Appeals denying the suggestion for hearing en banc was corrected on August 22, 1990 and is reproduced in Appendix L.

The District Court's March 5, 1990 order denying the intervention of petitioners, Reed and Aughenbaugh, is reproduced in Appendix A. The March 22, 1990 order approving the settlement proposal and denying the petition to reconsider the denial of intervention is reported in *Ragsdale v. Turnock*, 734 F.Supp. 1457 (N.D.Ill. 1990), and is reproduced in Appendix B. The judgment order of March 22, 1990 and the order of April 19, 1990 modifying the March 22, 1990 order are reproduced in Appendix C and D.

***Ragsdale v. Turnock* (88-790) Original Petition For Certiorari**

The Supreme Court of the United States granted certiorari on July 3, 1989, but reserved consideration of the question of jurisdiction until the hearing on the merits. *Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.E.2d 587 (1989). On December 1, 1989 the Court granted the joint motion to defer further proceedings. *Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed.2d 530 (1989). However, *Turnock v. Ragsdale* (88-790) is presently pending before the Court and has been carried over to the Court's 1990-91 term. *Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990).

The Court of Appeals' March 10, 1988 opinion is reported in *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), and is reproduced in 88-790 Appendix A. The judgment order of March 10, 1988, and the April 13, 1988 order amending the March 10, 1988 opinion, are reproduced in 88-790 Appendix B and C. The August 12, 1988 order and the August 16, 1988 amended order denying the petition for rehearing and the suggestion for rehearing en banc are reproduced in 88-790 Appendix E and D.

The District Court's November 27, 1985 opinion is reported in *Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985), and reproduced in 88-790 Appendix G. The class certification and preliminary injunction order entered December 11, 1985 is reproduced in 88-790 Appendix F.

JURISDICTION

This action was originally brought under 28 U.S.C. Sections 2201 and 2202 and 42 U.S.C. Section 1983 challenging the constitutionality of portions of the Ambulatory Surgical Treatment Center Act, the Medical Practice Act and the Health Facilities Planning Act, and under 28 U.S.C. Section 1343 seeking declaratory and injunctive relief in a class action.

The District Court's November 27, 1985, and December 11, 1985, orders preliminarily enjoined enforcement of portions of the Acts and the rules promulgated thereunder for first and/or early second trimester abortions or other abortion-related procedures. *Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985), is reproduced in 88-790 Appendix G. The December 11, 1985 judgment order is not reported but is reproduced in 88-790 Appendix F.

With jurisdiction based on 28 U.S.C. Section 1292, the Court of Appeals vacated as moot one portion of the District Court's decision, held unconstitutional the other challenged provisions, and affirmed the remainder of the decision on March 10, 1989. *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is reproduced in 88-790 Appendix A. Its March 10, 1988 judgment order and the April 13, 1988 order amending the March 10, 1988 slip opinion are reproduced in 88-790 Appendix B and C. The August 12, 1988 order and the August 16, 1988 amended order denying both the petition for rehearing and the suggestion for rehearing en banc are reproduced in 88-790 Appendix E and D.

With jurisdiction based on 28 U.S.C. Section 1254(2), defendants Turnock, Hartigan, and Selcke filed their notice of appeal in the Court of Appeals on November 7, 1988. (Reproduced in 88-790 Appendix H). On July 3, 1989 the Supreme Court accepted the case for argument. *Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.Ed.2d 587 (1989). On December 1, 1989, the Court granted the joint motion to defer further proceedings. *Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed. 530 (1989). However, *Turnock v. Ragsdale* (88-790) has been carried over to the Court's 1990-91 docket. *Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990).

The settlement proposal considered by the District Court would permanently enjoin enforcement of portions of the Acts and the rules promulgated thereunder for abortions and abortion-related procedures performed from conception to birth. Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) would be created with their own separate standard of medical regulation. Many abortion sites would be excluded completely from all medical regulations and licensing requirements of the State of Illinois. A February 13, 1990 deadline was set by the District Court for interested parties to file their written objections to the settlement proposal.

On February 13, 1990, petitioners, Murphy and Greenwood, filed their written objections, and petitioners, Reed and Aughenbaugh, filed their petition to intervene. At the fairness hearing on February 23, 1990, petitioners, Murphy, Greenwood, Reed and Aughenbaugh, personally appeared and through counsel presented their oral objections to the settlement proposal.

The March 5, 1990 order denying intervention is reproduced in Appendix A. On March 15, 1990 a petition to reconsider was filed. The March 22, 1990 judgment order, and the March 22, 1990 order, which approved the settlement proposal and denied the petition to reconsider the petition to intervene, are reproduced in Appendix C and B. On March 30, 1990, petitioners, Murphy and Greenwood, filed a Rule 52(b) petition, which was granted in part by the the April 19, 1990 order which is reproduced in Appendix D.

With jurisdiction based on 28 U.S.C. Section 1291, on April 20, 1990, petitioners, Murphy and Greenwood, and petitioners, Reed and Aughenbaugh, filed separate notices of appeal, which are reproduced in Appendix F and E. The appeal of petitioners, Reed and Aughenbaugh, included the District Court's March 5, 1990 order.

On April 23, 1990 the order of April 19, 1990 granting the Rule 52(a) petition was docketed. With jurisdiction still based on 28 U.S.C. Section 1291, on May 18, 1990, petitioners, Murphy and Greenwood, and petitioners, Reed and Aughenbaugh, again filed separate notices of appeal which included the April 19, 1990 order. (Reproduced in Appendix H and G). The appeal of petitioners, Reed and Aughenbaugh, still included the March 5, 1990 order.

On July 9, 1990 the District Court refused to supplement the record with the over 1200 telegrams, models, let-

ters and other papers it considered in approving the settlement proposal. (Reproduced at Appendix K).

The Court of Appeals consolidated the first two appeals on May 21, 1990 and consolidated all four appeals on June 7, 1990. (Reproduced in Appendix I and J). The motion for hearing en banc was denied on August 20, 1990 by order corrected on August 22, 1990. (Reproduced in Appendix L).

With jurisdiction based on 28 U.S.C. Sections 1254(1) and 2101(e), this petition for certiorari is being made to the Supreme Court of the United States.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Constitutional Provisions

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment IX:

The enumeration in the Constitution of certain rights,

shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIII:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Constitutional Provisions

Illinois Constitution of 1970, Article I, Section 1:

All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are insti-

tuted among men, deriving their just powers from the consent of the governed.

Illinois Constitution of 1970, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution of 1970, Article I, Section 12:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain judgment by law, freely, completely, and promptly.

Illinois Constitution of 1970, Article I, Section 23:

A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities.

Illinois Constitution of 1970, Article I, Section 24:

The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.

Illinois Constitution of 1970, Article II, Section 1:

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Illinois Constitution of 1970, Article IV, Section 1:

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives, elected by the electors from 50 Legislative Districts and 118 Representative Districts.

Illinois Constitution of 1970, Article V, Section 15:

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

State Statutes

Abortion Act

Ill.Rev.Stat., Ch. 38, Sec. 81-21:

(Section 1 of the Abortion Act)

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and

that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

Ill.Rev.Stat., Ch. 38, Sec. 81-30.1:

(Section 10.1 of the Abortion Act)

Any physician who diagnoses a woman as having complications resulting from an abortion shall report, within a reasonable period of time, the diagnosis and a summary of her physical symptoms to the Illinois Department of Public Health in accordance with procedures and upon forms required by such Department. The Department of Public Health shall define the complications required to be reported by rule. The complications defined by rule shall be those which, according to contemporary medical standards, are manifested by symptoms with severity equal to or greater than hemorrhaging requiring transfusion, infection, incomplete abortion, or punctured organs. If the physician making the diagnosis of a complication knows the name or location of the facility where the abortion was performed, he shall report such information to the Department of Public Health.

Any physician who intentionally violates this Section shall be subject to revocation of his license pursuant to paragraph (22) of Section 22 of the Medical Practice Act of 1987.

Ill.Rev.Stat., Ch. 38, Sec. 81-31.1(a) & (b):
(*Section 11.1 of the Abortion Act*)

(a) The payment or receipt of a referral fee in connection with the performance of an abortion is a Class 4 felony.

(b) For purposes of this Section, "referral fee" means the transfer of anything of value between a doctor who performs an abortion or an operator or employee of a clinic at which an abortion is performed and the person who advised the woman receiving the abortion to use the services of that doctor or clinic.

Ambulatory Surgical Treatment Center Act

Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.1 et seq.
(Reproduced in 88-790 Appendix I)

Health Facilities Planning Act

Ill.Rev.Stat., Ch. 111 1/2, Sec. 1151 et seq.
(Reproduced in 88-790 Appendix J)

Medical Practice Act

Ill.Rev.Stat., Ch. 111, Sect. 4400-22
(Reproduced in 88-790 Appendix K)

State Regulations

Ambulatory Surgical Treatment Center licensing Requirements

77 Ill.Adm.Code, Ch. 1, Sec. 205, Subch. b
(Reproduced in 88-790 Appendix L)

August 15, 1990 Amendments to Ambulatory Surgical
Treatment Center Licensing Requirements

77 Ill. Adm. Code, Ch. 1, Sec. 205

(Reproduced in Appendix M)

STATEMENT OF THE CASE

On December 1, 1990 by joint motion *Turnock v. Ragsdale* (88-790) was deferred on the eve of oral arguments without the terms of the settlement proposal being disclosed to the Supreme Court. Negotiations had produced a proposed consent decree which would reject, by permanent injunction, portions of the Ambulatory Surgical Treatment Center Act, the Health Facilities Planning Act and the Medical Practice Act, for all three trimesters of pregnancy.

The original preliminary injunction of the District Court in 1985, affirmed by the Court of Appeals in 1988, had limited the injunction of the Acts to the first and/or early second trimester of pregnancy. Neither the District Court in 1985 nor the Court of Appeals in 1988 had found the Acts unconstitutional for the late second and/or third trimesters of pregnancy. And the District Court in 1990 did not make a new finding of unconstitutionality prior to or upon approving the settlement proposal.

The express statutory scheme duly enacted by the Illinois General Assembly has been permanently enjoined and rejected by the consent of the parties and the orders of the District Court. No constitutional authority is cited by either the parties or the District Court for this rejection.

The original statutory scheme of the Illinois General Assembly provided that all abortions in Illinois were to be

performed in either ambulatory surgical treatment centers or hospitals. Under the settlement proposal any geographical location within the borders of Illinois can be an abortion site so long as it is not primarily used for surgical procedures. And these sites would be totally excluded from all state licensing requirements. All abortions performed at these sites would be outside of all state medical regulation. See enjoined Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.3 and *Ragsdale*, 734 F.Supp. at 1460, note 7.

In addition, the settlement proposal refers to abortion clinics as Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) and allows them to operate with their own separate--and less restrictive--standard of state medical regulation. See 77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpt. G, Sec. 205.710 in Appendix M and *Ragsdale*, 734 F.Supp. at 1460. For example, abortionists scrubbing for surgery and janitors cleaning toilet scrub brushes can use the same sink. Ironically, before being enjoined and then rewritten, this same section, Section 205.710, stated simply that all abortions "shall be provided to the public with the same standards of safety, effectiveness, and regard for patients rights as any other health service."

The consent decree would establish a judicially approved double standard. First, as noted, some abortion sites are excluded from all state medical regulation and licensing requirements. Other sites are not excluded. The Ambulatory Surgical Treatment Center Act makes no such distinction. Second, portions of the Health Facilities Planning Act will not be enforced against Limited Procedure Specialty Centers but will be enforced against other surgical centers. The Health Facilities Planning Act makes no such distinction. *Ragsdale*, 734 F.Supp. at 1466-69. No statutory authority is cited by either the parties or the District Court to legalize this discriminatory enforcement.

The settlement proposal also effectively enjoins in part the enforcement of certain portions of the Abortion Act, which were never plead in these proceedings, and the constitutionality of which was never challenged.

First, Section 10.1 requires a physician to report abortion complications to the Illinois Department of Public Health. Ill.Rev.Stat., Ch. 38, Sec. 81-30.1. But the consent decree would enjoin the reporting of abortion complications by physicians at ambulatory surgical treatment centers. Ambulatory Surgical Center Licensing Requirements, 77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.760-Reports, in 88-790 Appendix at page App. 223.

Second, Section 11.1 makes the payment or receipt of a referral fee in connection with the performance of an abortion a criminal offense. Ill.Rev.Stat., Ch. 38, Sec. 81-31.1. But the consent decree would enjoin the referral fee prohibition for abortion counselors. Ambulatory Surgical Center Licensing Requirements, 77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.730(b)-Counseling, in 88-790 Appendix at page App. 221.

The new medical regulations adopted August 15, 1990 pursuant to the consent decree are also inconsistent with prior agency imperatives. First, since abortion procedures are subject to particular complications and require specialized postoperative care, agency concern mandated the presence of a supervising obstetrical or gynecological nurse. 77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.720-Personnel, Agency Note, in 88-790 Appendix at page App. 220. Second, since a woman cannot make a truly voluntary decision while undressed on the procedure table, agency concern mandated that a woman learn of the risks and alternatives to an abortion outside of the coercive setting of the procedure room. 77 Ill.Adm.Code, Ch. 1, Sec.

205, Subpart G., Sec. 205.730-General Patient Care, Agency Note, in 88-790 Appendix at page App. 222. Yet, these two regulated concerns would be enjoined by the consent decree.

Petitioners, Murphy and Greenwood, are practicing emergency room registered nurses and members of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future. Upon learning of the terms of the settlement proposal, these petitioners personally concluded that the health and medical care of women seeking abortions had been illegally, unconstitutionally, and dangerously compromised. They filed timely written objections, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

Moreover, the settlement proposal also effectively enjoined enforcement of Section 1 of the Abortion Act which acknowledges unborn children as human beings and which establishes the state personhood of unborn children. First, the consent decree allows abortion procedures to be performed outside of ambulatory surgical treatment centers and hospitals in sites least able to protect the life and liberty interests of an unborn child. Second, future regulations are restricted to health and safety concerns for the woman and by permanent injunction cannot include health and safety concerns for the unborn child. Third, Pregnancy Termination Specialty Centers, or PTSC's, can perform abortions on a woman with an unborn child of 18 weeks gestational age. In the future an unborn child of a higher gestational age may be terminated at a PTSC dependant solely upon health and safety concerns for the woman. The health and safety of the unborn child by permanent injunction is not to be considered. And at no time is the personhood of the unborn child in Illinois either acknowledged or considered. *Ragsdale*, 734 F.Supp. at 1466, at 1469, and at 1470, respectively.

Petitioners, Reed and Aughenbaugh, as expectant fathers of unborn children, concluded that the consent decree illegally, unconstitutionally, and dangerously compromised the health, safety, life and liberty interests, and personhood of their unborn children. They filed their written objections through their petition to intervene, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

The District Court's March 22, 1990 order, approving the settlement proposal and entering the consent decree, acknowledged that the "consent decree introduces a new scheme" and recognized that "the settlement creates a network of statutes and rules regulating the provisions of abortion services." *Ragsdale*, 734 F.Supp. at 1460, and at 1461, respectively. The new rules and medical regulations integral to this newly created organic statutory scheme were formally adopted on August 15, 1990 and are reproduced in Appendix M.

The District Court's March 22, 1990 order is silent as to the Illinois Constitutional provisions which provide for a clear separation of power between the executive and legislative branch and which vest all legislative authority in the Illinois General Assembly. The order is also silent as to other Illinois Constitutional provisions which allow the unborn child to protect her rights and which mandate the courts to allow her to do so.

Petitioners, Murphy, Greenwood, and petitioners, Reed, and Aughenbaugh, filed separate appeals which were consolidated by the Seventh Circuit. Petitioner, Reed and Aughenbaugh, also included in their appeal the denial of their intervention. All briefs have been timely submitted. Oral arguments have been set for December 4, 1990. Judgment has not been rendered by the Seventh Circuit.

The prior December, 1985 order of the District Court was scheduled for oral argument before the Supreme Court in December, 1989--four years later. Petitioners are now appealing to the Supreme Court to avoid additional and needless delay and to present questions of imperative public importance in a case which the Supreme Court has already recognized as having exceptional importance and which is presently pending on the Court's 1990-91 docket.

SUMMARY OF ARGUMENT:
The Jurisdictional Questions Presented
Are Of Imperative Public Importance

This case is about authority. A district court rewrites statutes without authority based upon a settlement proposal which creates a new statutory scheme without authority. The personhood of Illinois unborn children is ignored without authority while their life and liberty interests are compromised without authority. What new constitutional imperative will now be imposed upon the States as justification? Will this imperative be more indicative of probation restrictions for criminals or constitutional guidelines for States?

This case is also about the original intent and the principles intended by our forefathers in forming this great nation and the present judicial threat to its continued existence. Like a cancer, the unsound principles of *Roe* and its progeny have grown through federalism into state sovereignty and presently threaten the very independence of the States. Ironically, as parts of the world are experiencing their first independence in decades, the federal judicial grip is tightening around the separate and independent existence of the States. Was the intent of our forefathers for the States to be treated as counties within a One Nation State?

The Supreme Court recognized the exceptional importance of *Turnock v. Ragsdale* (88-790) on July 3, 1989 by accepting the case for argument. Upon joint motion the Court deferred its consideration of *Turnock v. Ragsdale* on December 1, 1989. The Court was never advised of the terms of the settlement proposal.

On March 22, 1990 the District Court approved the settlement proposal over the objections of petitioners and others. Administrative regulations were adopted pursuant thereto on August 15, 1990. Yet the District Court had no authority to approve the settlement proposal because it lacked subject matter jurisdiction to rewrite statutes enacted by the Illinois General Assembly. No agency had any authority to adopt any regulations pursuant thereto since regulatory authority is limited by the statutes enacted by the Illinois General Assembly and cannot be expanded by a new statutory scheme created by the consent of the parties.

A federal court cannot extend its judicial authority through federalism into state sovereignty, ignore the separation of powers, and violate the exclusive legislative prerogative of the Illinois General Assembly. Such federal judicial activism is totally without constitutional justification, and any order entered pursuant thereto is void ab initio. Without subject matter jurisdiction, no court--federal or state--can constitutionally proceed further. The void action of the parties and the District Court justifies a deviation from normal appellate practice. The Court can immediately consider this disabling judicial blow to state sovereignty.

This expansion of power in the federal judiciary beyond all precedent transgresses the basic principles defining judicial power and requires immediate settlement by the Court. Granting certiorari before the rendering of judgment would clearly establish the imperative public importance

that the Court places upon the limitation of federal judicial authority within constitutional constraints. The Court could immediately limit the application of *Missouri v. Jenkins*, which can be construed as an open door to judicial activism which authorizes the circumvention of state sovereignty and legislative prerogative found in *Ragsdale v. Turnock*.

Moreover, Section 1 of the Abortion Act provides that once *Roe v. Wade* is modified, an unborn child in Illinois is by law recognized as a human being and as a legal person from the time of conception. Since *Webster v. Reproductive Health Services* modified *Roe v. Wade*, an unborn child in Illinois is now entitled to the right to life from conception and is guaranteed legal access to the courts to allow her to protect those rights.

The constitutional validity of Section 1 of the Abortion Act actually turns on the constitutional validity of *Roe v. Wade*. The Court can now examine *Roe v. Wade* and its progeny and determine whether *Roe v. Wade* should be explicitly reversed. Such a reexamination of *Roe v. Wade* is of imperative public importance, and includes the questions of personhood and standing raised in *Dred Scott v. Sandford* and whether the life and liberty interests of unborn children as incompetents are recognized by *Cruzan v. Director, Missouri Department of Health*.

Joining *Turnock v. Ragsdale* (88-790), which is presently pending on the Court's 1990-1991 docket, with *Ragsdale v. Turnock* would give the Court an immediate opportunity both to halt the present judicial threat to state sovereignty and legislative prerogative and to reexamine *Roe v. Wade* in light of its recent expansion by the Seventh Circuit to include the sale of unborn children up to the moment before birth. *Lifchez v. Hartigan*, __ F.2d __ (7th Cir. Sept. 10, 1990). Unborn children can now be sold for body parts, like old cars.

ARGUMENT ONE:
The District Court Lacked Subject Matter
Jurisdiction To Enter A Consent Decree
Outside Of Its Inherent Power

In Illinois only the General Assembly can constitutionally enact statutes. Yet, the executive branch, agencies and private citizens requested the District Court to enter a consent decree which rewrites the express statutory scheme duly enacted by the General Assembly. How can a federal court take any judicial action without subject matter jurisdiction? Or does federal judicial authority extend through federalism into state sovereignty and allow the entry of a consent decree in violation of the exclusive legislative prerogative of the General Assembly?

Illinois has long recognized a separate and distinct separation of powers between the legislative, executive and judicial branches are separate. No branch may exercise powers belonging to another. Illinois Constitution of 1970, Article II, Section 1.

In Illinois the legislative power is vested exclusively in the General Assembly. Illinois Constitution of 1970, Article IV, Section 1. On common-law principles, as well as settled constitutional law, this legislative power cannot be delegated to another body, authority or person. *People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152, 155 (1973).

This sovereign legislative power vested in the General Assembly is consistent with the federal Constitution which does not require a specific separation or allocation of powers within state government. Debate as to the wisdom of the allocation of powers within any state government is foreclosed to the federal judiciary. *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988).

The Illinois Attorney General, as the legal officer of the State, is a member of the executive branch and is constitutionally prohibited from exercising the powers of the legislative branch. Illinois Constitution of 1970, Article II, Section 1, and Article V, Section 15.

Thus, the representations of the Attorney General are not binding on the courts and legislature of the State. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The Attorney General cannot reject legislation, or hold particular statutes to be unconstitutional, or otherwise be the binding determinator of duly enacted statutes. *National Revenue Corporation v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986).

The Cook County State's Attorney is a member of the county executive branch with the Cook County Board serving as the county legislative branch. Any state's attorney, including the Cook County State's Attorney, is not authorized to act for the county board. If he does, his actions will be judicially held to be void ab initio. *Will County v. George*, 103 Ill.App.3d 1016, 59 Ill.Dec. 264, 431 N.E.2d 765 (1982).

If the Cook County State's Attorney cannot legislate for the Cook County Board, he certainly cannot legislate for the Illinois General Assembly. His judicial designation by the District Court as class representative for all Illinois state's attorneys does not create constitutionally recognized legislative authority. The Cook County State's Attorney is in the same position as the Illinois Attorney General. Neither can legislate for the Illinois General Assembly.

Yet the settlement proposal rejects by permanent injunction portions of three separate express statutes--the Ambulatory Surgical Treatment Center Act, the Medical

Practice Act, and the Health Facilities Planning Act--and ignores provisions of one express statute--the Abortion Act. The express statutory scheme duly enacted by the Illinois General Assembly has been illegally rejected. *Violet*, supra. A court cannot constitutionally rewrite a statute under the guise of construing it. *Wynn v. Scott*, 449 F.Supp. 1302, 1330 (N.D.Ill. 1978), opinion adopted in full sub-nom *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979). The order approving the settlement proposal which rejects and rewrites statutes duly enacted Illinois General Assembly is void ab initio.

The Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board are all administrative agencies. These agencies have no greater powers than those conferred upon them by the legislation creating them. *Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 6 Ill.Dec. 867, 363 N.E.2d 814, 815 (1977). And the Illinois General Assembly in delegating to these agencies the performance of certain functions may not invest them with arbitrary powers. The General Assembly cannot constitutionally delegate the power to legislate. *Tibbitts*, 305 N.E.2d at 155.

In direct contrast, the August 15, 1990 Amendments to the Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill. Adm. Code, Ch. 1, Section 205, were not authorized by duly adopted statutory enactments of the Illinois General Assembly and were adopted clearly outside the scope of statutory authority provided for by the Illinois General Assembly.

The General Assembly's express statutory scheme required, among other provisions, that all abortions are to be performed at medically regulated sites. Yet under the settlement proposal, so long as the site of the abortion is not devoted primarily to the performance of surgical procedures,

an abortion can be performed without any medical regulation. An abortion can take place in the patient's home, on a boat, in a plane, on a train, in a truck--any place not primarily used for surgery. Back alley abortions can become legal and unregulated. Yet the agencies had no authority to mandate such action through their consent to the settlement proposal. *Village of Lombard*, 363 N.E.2d at 815.

In addition, the August 15, 1990 Amendments created separate and distinct regulations for Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers). No statute duly enacted by the Illinois General Assembly authorized the creation of these centers. The agencies had no authority either to create these centers or to adopt a separate regulatory scheme for them.

A district court should not stray from its judicial province and enter an order which permits administrative agencies to engraft their own notions outside of express statutory authority. *Vermont Yankee Nuclear Power Corp. v. Natural Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1196, 55 L.Ed.2d 460 (1978)), *Tibbitts, supra*, and *Village of Lombard, supra*. Yet, this is exactly what the District Court did in *Ragsdale v. Turnock*.

The wisdom or the lack of wisdom of a regulatory enactment is for the General Assembly to determine, and whether it is the best means to achieve the desired results, and whether the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the General Assembly. The honest conflict of serious opinion does not suffice to bring these matters within the range of judicial cognizance. *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary District of Greater Chicago*, 52 Ill.2d 320, 288 N.E.2d 436, 441 (1972). Such is the mistake of the District Court in *Ragsdale v. Turnock*.

That the respondents were able to convince the District Court to approve the settlement proposal does not alter its voidness. A consent decree's force comes from agreement rather than positive law, the validity of the consent decree depends upon the parties' authority to give assent. *Dunn v. Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986). Courts must not allow consenting parties to act without authority. District courts must be on the lookout for such attempts to use consent decrees to make end runs around the legislature. *Kasper v. Board of Election Commissioners of the City of Chicago*, 814 F.2d 332, 340 (7th Cir. 1987).

First, the District Court should have looked to the authority of the Illinois Attorney General and the Cook County State's Attorney. Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government to engage in certain acts. They may chafe at these restraints and seek to evade them. If they do, the officeholders have acted without authority, as they have here. *Dunn*, 808 F.2d at 560.

Second, the District Court should have looked to the authority of the Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board. A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them, as they attempted here. *Kasper*, 814 F.2d at 341-342.

Third, the District Court should have recognized that the private citizens, such as Dr. Ragsdale, simply have no authority at all. If they did, then other citizens with other beliefs or causes would have authority too. Pornographers could join with the Attorney General and rewrite obscenity statutes. Polluters could join with the Attorney General and rewrite environmental statutes.

The express statutes of the Illinois General Assembly become suggested guidelines rather than law. The constitutionally established legislative branch acts as an advisory board making recommendations to the federal judiciary.

The illegality and unconstitutionality of the conduct of the parties is a legal certainty. The March 22, 1990 order merely authorizes that conduct and initiates other conduct of a similar ilk. *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980).

The District Court in *Ragsdale v. Turnock* judicially created the organic statutes which necessitated the enactment of the August 15, 1990 Amendments to the ASTC Licensing Requirements—a clearly illegal adaptation of unconstitutional judicial action and equally unconstitutional executive and agency action.

The March 22, 1990 order and the resulting regulations adopted pursuant thereto are a creature of judicial cloth, not legislative cloth and are not mandated by any statutory or regulatory provision. *Weinberger v. Catholic Action of Hawaii / Peace Education Project*, 454 U.S. 139, 141, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981). These unconstitutional judicial and administrative actions, done with invalid executive consent, constitute a judicial cloth which is a shroud evidencing the death of state sovereignty and the birth of a national court system in which the States are treated as counties within one large Nation State.

On June 3, 1788, at the Virginia Convention convened that spring to consider the United States Constitution, Patrick Henry spoke of his abhorrent fear of a consolidated government. His fear then need not become our reality now. By granting certiorari the Court can send a strong message to the federal judiciary and in the process reconsider *Missouri v. Jenkins*, 50 C.C.H. S.Ct. Bull. B2023 (April 18, 1990), and

limit its application. Without question, if *Missouri v. Jenkins* is not immediately limited and *Ragsdale v. Turnock* is not immediately settled by the Court, the door remains open for a flood of lower court cases well beyond the Court's ability to correct through certiorari in the future. State sovereignty will be destroyed, and with it, the republic as we know it.

ARGUMENT TWO:

Failing To Consider The Personhood Of Illinois Unborn Children, The District Court Lacked Personal Jurisdiction

Since *Webster* modified *Roe*, unborn children in Illinois are now by law recognized as persons with full rights under the Illinois Constitution, including guaranteed access to the courts. Yet, by denying the intervention of Illinois unborn children, Reed and Aughenbaugh, and approving the consent decree, the District Court clearly violated their state constitutional rights, including their state life and liberty interests. Can the federal judiciary ignore the personhood of Illinois unborn children and without any constitutional authority deny their state constitutional rights?

Since 1975, Section 1 of the Abortion Act has acknowledged that the long standing policy of the State of Illinois to protect the right to life of an unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the *Roe v. Wade* decision. Illinois Abortion Act, Section 1.

The Illinois Supreme Court has ordered that such a clearly expressed legislative concern for an unborn child must be considered by the courts. *Green v. Smith*, 71 Ill.2d 501, 17 Ill.Dec. 847, 377 N.E.2d 37, 41 (1978). In Illinois to suggest that a child can be considered an injury offends fun-

damental values attached to human life. *Cockrum v. Baumgartner*, 95 Ill.2d 193, 69 Ill.Dec. 168, 447 N.E.2d 385, 388 (1983). Illinois public policy strongly supports the preservation of the sanctity of human life, even if in an imperfect state. *Siemeniec v. Lutheran General Hospital*, 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691, 700 (1987).

Even the federal courts have recognized the rights of an unborn child in Illinois. In *Roberts v. Patel*, 620 F.Supp. 323 (N.D.Ill. 1985), a child named Joshua was injured in utero. The District Court acknowledged both that Illinois has expressed a strong public policy to protect an unborn child from the moment of conception, and that Illinois has actively sought to regulate abortions within constitutionally permissible parameters. The District Court concluded that in light of the strong Illinois policy favoring protection of an unborn child, and recognizing the unborn child's protectable interest, Joshua's mother's physicians owed a duty not only to Joshua's mother, but to Joshua as well. When treating a pregnant woman, the physician has two patients--the expectant mother and the unborn child. *Roberts*, 620 F. Supp. at 325-26.

Uncomfortable with these judicial determinations and the statutorily ratified public policy found in Section 1, various parties have attacked its constitutionality and have sought to enjoin it. These legal efforts have been futile. First, the unsuccessful constitutional attack on Section 1 is found in *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978). The plaintiffs alleged that Section 1 recited an impermissible state purpose. The District Court disagreed, refused to hold Section 1 unconstitutional, and held that it merely states that the intention of the General Assembly is to reasonably regulate abortions in conformity with Supreme Court decisions. *Wynn*, 449 F.Supp. at 1314. On appeal the Appellate Court affirmed the District Court. *Wynn v. Carey*,

599 F.2d 193 (7th Cir. 1979). Second, the unsuccessful attempt to enjoin Section 1 is found in *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980). Plaintiffs sought to enjoin it based on its wording. The Court of Appeals did not agree that Section 1, when read as a whole, expressed an unlawful purpose, and refused to enjoin it. *Charles*, 627 F.2d at 779. Three years later, the District Court also refused to permanently enjoin Section 1 for the same reason. *Charles v. Carey*, 579 F.Supp. 464, 466 (N.D.Ill. 1983).

Since the constitutionality of Section 1 has been upheld and the judiciary has refused efforts to enjoin it, the Court's decision in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), becomes of paramount importance since *Webster* modified *Roe*. *Webster*, 108 L.Ed.2d at 438. Indeed, the District Court could not have entered its March 22, 1990 order if *Roe* had not been modified.

In *Turnock v. Ragsdale* (88-790) both the District Court in 1985 and the Appellate Court in 1988 had previously enjoined enforcement of medical regulations during the first half of pregnancy. *Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985), and *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988). In direct contrast, the March 22, 1990 order of the District Court did enforce some medical regulations during the first half of pregnancy. *Ragsdale v. Turnock*, 734 F.Supp. 1457 (N.D.Ill. 1990). The only basis the District Court had for reversing itself was the modification of *Roe*. And pursuant to Section 1, once *Roe* is modified, an unborn child in Illinois is by law recognized as a human being and as a legal person.

An Illinois unborn child may now enforce her state constitutional rights in the courts. Baby Reed and Baby Aughenbaugh, as legal persons under the laws and the Constitution of the State of Illinois, are entitled to appear in

court, retain legal representation to protect their legal interests, and are non-joined indispensable parties in *Ragsdale*. Yet, the District Court denied their petition to intervene as of right and even failed to acknowledge their personhood. Once again, the judicial application of *Roe* has proven to be doctrinally barren.

However, the Court has not refrained from reconsidering a prior construction of the Constitution which has proven unsound in principle and unworkable in practice. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Since the Court cannot abdicate its constitutional responsibility to respect state sovereignty, the constitutional barrier imposed by *Roe* must be removed. The task of preserving and balancing the life and liberty interests of the unborn child with those of her mother should be left to the "laboratory" of the states. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed 747 (1932).

ARGUMENT THREE:
State And Federal Life And Liberty Interests
Of Illinois Unborn Children Were Not
Considered By The District Court

In 1820 the Slave State of Mississippi protected the most defenseless--the mentally disturbed, the seriously retarded and unborn children. *State v. Jones*, 2 Miss. (One Walker) 39 (1820). The Supreme Court has already recognized the liberty interests of the mentally disturbed and the seriously retarded. *Parham v. J.R.*, 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), and *Youngberg v. Romeo*, 457 U.S. 307, 420, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). But the Court has not yet spoken to the life and liberty interests of unborn children. Certainly, the Court can provide no less for unborn children--the most defenseless of all.

An unborn child is temporarily incompetent until her emancipation as an adult. From conception until birth is just the first part of that incompetence. To deny the liberty interests of an unborn child would give her less protection at the end of the 20th century than she had in the Slave State of Mississippi at the beginning of the 19th century. Such a holding is inconsistent with both the original intent and the principles intended in the United States Constitution and in the 5th, 9th, 10th, 13th and 14th Amendments. Fortunately, with statutorily acknowledged personhood, the Illinois Constitution does establish the state liberty interests of an unborn child and allow her to protect those interests in the judicial system. Illinois Constitution of 1970, Article I, Sections 1, 2, 12, 23 and 24. Yet, the District Court in *Ragsdale v. Turnock* failed to consider these interests at all.

Finally, the Court has acknowledged that incompetents can have surrogates to protect their life and liberty interests. *Cruzan v. Director, Missouri Department of Health*, 50 C.C.H. S.Ct.Bull. B4106 (June 25, 1990). As an incompetent, an Illinois unborn child should have a surrogate to protect her life and liberty interests. But in Illinois a surrogate is only allowed to withdraw life-sustaining services if the incompetent has been diagnosed as terminally ill and either irreversibly comatose or in a persistent vegetative state. *In re Estate of Greenspan*, 137 Ill.2d 1 (1990), and *In re Estate of Longeway*, 133 Ill.2d 33, 139 Ill.Dec. 780, 549 N.E.2d 292 (1989). It would be clinically medically primitive to consider a healthy, alert and thriving unborn child terminal, comatose or vegetative simply because she is in utero; life-sustaining services cannot be legally withdrawn from her. It matters not that such services are being provided in utero by her expectant mother. If in the exercise of her first liberty interests found in *Griswold*, a woman becomes pregnant, her second liberty interests must be balanced against the life and liberty interests of her unborn child. Being in direct conflict, *Roe* must be explicitly overruled.

Even in *Dred Scott*, the Court recognized the right of the States to establish personhood. *Dred Scott v. Sandford*, 60 U.S. 393, 426, 16 L.Ed. 691 (1857). In abolishing that right as to unborn children, *Roe* imposed a much greater infringement upon state sovereignty. However, *Roe* and *Dred Scott* do share one common thread--both deny human beings access to the courts. The Civil War, the Emancipation Proclamation, and the Post-War Constitutional Amendments negated the result of *Dred Scott*. The Court has the opportunity to negate both the result and analysis of *Roe*, and in the process, set the judicial tone for the next century of our republic--true respect for the humanity of all, as our forefathers intended. How we treat the least of us, is how we will ultimately be treated and judged.

CONCLUSION

For all of the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and join *Turnock v. Ragsdale* (88-790) for argument on the merits.

Respectfully submitted,

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90-714

(2)

Supreme Court, U.S.
FILED

NOV 2 1990

JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
Supreme Court of the United States
October Term, 1990

RITAELEN M. MURPHY, et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

Petition for Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO CERTIORARI PETITION

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**In The
Supreme Court of the United States
October Term, 1990**

RICHARD M. RAGSDALE, M.D., etc., et al.,

Respondents-Plaintiffs-Appellees,

and

RITAELEN M. MURPHY, et al.,

Petitioners-Plaintiffs-Appellants,

vs.

BERNOCK J. TURNOCK, M.D., etc., et al.,

Respondents-Defendants-Appellees,

and

KENNETH M. REED, et al.,

Petitioners-Proposed Intervenors-Appellants.

**Petition for Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Seventh Circuit**

APPENDIX TO CERTIORARI PETITION



APPENDIX A

(Entered March 5, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Court denies Petition to Intervene and to maintain Class Action of Baby Reed and Baby Aughenbaugh but grants Kenneth Reed and Mark Aughenbaugh leave to appear as Amicus Curiae and grants Craig H. Greenwood leave to file his appearance as their counsel, nunc pro tunc to February 22, 1990.

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: March 5, 1990

APPENDIX B

(Entered March 22, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

MEMORANDUM OPINION AND ORDER

Before the court is the parties' joint motion under Rule 23(e) of the Federal Rules of Civil Procedure for approval of a proposed settlement and consent decree. For the reasons stated below, the court grants the motion and enters the consent decree.

BACKGROUND

Plaintiffs brought this action on June 28, 1985, seeking declaratory and injunctive relief from the enforcement of portions of three Illinois statutes, the Medical Practice Act, Ill. Rev. Stat. ch. 111, Sections 4433(1)(a)-(e) (later recodified as Sections 4400-22 (1)(a)-(e)), the Ambulatory Surgical

Treatment Center Act, Ill. Rev. Stat. ch. 111 1/2, Sections 157-8.1 et seq., and regulations promulgated thereunder, and the Health Facilities Planning Act, Ill. Rev. Stat. ch. 111 1/2, Sections 1152 et seq.

Plaintiffs challenged the constitutionality of these statutes and regulations, contending that they form a scheme which in effect requires all abortions to be performed in a hospital or its functional equivalent. Plaintiffs charged that this scheme violated the equal protection rights of Illinois physicians who perform or desire to perform abortions, and the privacy rights of Illinois women who desire or may desire to obtain an abortion. This court agreed, and on November 27, 1985, granted plaintiffs' motion for preliminary injunction.¹ On March 10, 1988, the United States Court of Appeals for the Seventh Circuit upheld the injunction, except for one portion which it vacated as moot.²

Defendants filed a Notice of Appeal, seeking review by the United States Supreme Court. On July 3, 1989, the Supreme Court entered an order accepting the case for oral argument but postponing the question of jurisdiction until the hearing on the merits. Before the date scheduled for oral argument, the parties negotiated the proposed consent decree now before this court. The decree seeks to resolve all claims for declaratory and injunctive relief brought by plaintiffs and reserves their claim for attorney's fees, costs and expenses. On December 1, 1989, the Supreme Court granted the parties' joint motion to defer proceedings there pending this court's decision to approve or disapprove the proposed decree.

¹The court's opinion is published at 625 F. Supp. 1212 (N.D. Ill. 1985).

²The decision of the Court of Appeals is published at 841 F.2d 1358 (7th Cir. 1988).

Following the Supreme Court's order, the parties gave notice of the proposed settlement to the plaintiff and defendant classes, with this court's approval.³ The court allowed any class members objecting to the proposed settlement to file submissions by February 9, 1990, with responses due the following week. During this period, the court received 326 telephone calls, two telegrams, and 1,266 letters. The court read every single letter in its entirety.

On February 23, 1990, the court conducted a hearing to assess the fairness of the proposed settlement. The parties explained their reasons for negotiating the settlement; afterward, the court heard objections from amici who had filed briefs with the court.⁴ Finally, the court permitted

³The parties gave notice by mail to all facilities which, at the time the complaint was filed, were licensed ASTCs (Ambulatory Surgical Treatment Centers) and offered abortions; by publication in the Chicago Tribune and the Chicago Sun-Times to all presently licensed ASTCs which offer abortions; and by mail to all members of the defendant class of state's attorneys. All methods of notice were completed by January 29, 1990.

As required, the notice also informed class members of the fairness hearing to be conducted on February 23, 1990. For this and other aspects of the settlement process, the court was guided by the procedures set forth in the Manual for Complex Litigation, Second, Sections 30.4-30.47 (1985).

⁴Among the amici were certain members of the Illinois General Assembly and an individual attorney from Chicago. There were other objectors who filed materials with the court, but did not style themselves "amici." The court heard their comments as well. The court also heard objections from some of the state's attorneys of the defendant class, who had submitted briefs to the court.

Two objectors, Kenneth M. Reed and Mark I. Aughenbaugh, sought leave to intervene on behalf of "a class consisting of all Illinois unborn babies." Any interest in protecting the fetus is for the state to assert, however. The objectors brought no evidence showing "gross negligence or bad faith" committed by the state in representing the interests implicated by this litigation. Without such a showing, the state's

individuals attending the hearing — who filled the largest courtroom in the courthouse — to express their views if they wished. After reviewing the prior findings of fact and conclusions of law issued by this court, reviewing the opinion of the Seventh Circuit Court of Appeals and the applicable decisions of the United States Supreme Court, examining the briefs filed by the parties and objectors, and hearing and considering all of the written and oral presentations made in connection with the fairness hearing⁵, the court makes the following findings of fact and conclusions of law.

DISCUSSION

In deciding whether to approve a proposed consent decree, “a district court must determine whether [it] is lawful, fair, reasonable, and adequate.” E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985). The court does not draw on a clean slate, however. Deference must be given to the settlement, since it embodies a negotiated compromise between the parties. A district court should

representation must be presumed adequate. United States v. South Bend Community School Corporation, 692 F.2d 623 (7th Cir. 1982). Accordingly, the court denied the objectors’ petition but granted leave to file written objections and appear as amici, which they did. Their Petition to Reconsider Petition to Intervene and to Maintain Class Action of Baby Reed and Baby Aughenbaugh, filed March 15, 1990, is likewise denied. See United States v. City of Chicago, 897 F.2d 243 (7th Cir. 1990) (“intervention to take an appeal is permissible only if the original parties’ decision to discontinue the battle reflects gross negligence or bad faith”).

⁵One notable submission to the court is the Draft Order Approving and Entering Consent Decree, filed jointly by plaintiffs and defendants on March 16, 1990. It reflects the parties’ stipulations as to findings of fact and conclusions of law in this case. As such it can more properly be characterized as a Stipulation, which is how the court will hereinafter refer to it. While declining to incorporate the entire Stipulation into this opinion, the court enters it into the record as evidence to be weighed in evaluating the proposed consent decree.

therefore "be chary of disapproving a consent decree." Id., p. 890. Indeed, the court "may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate." Id., p. 889.

The consent decree proposed here enjoins the enforcement of certain statutory provisions challenged by plaintiffs. Foremost among them are Section 157-8.3(A) of the ASTCA, defining any facility in which a medical or surgical procedure is utilized to terminate a pregnancy as an "Ambulatory Surgical Treatment Center"; and a host of regulations requiring ASTCs to comport with physical plant specifications and other restrictions which "in effect...require ASTCs to be the functional equivalent of small hospitals."⁶ It was this statutory scheme that plaintiffs regarded as infringing on the constitutional right of women to have an abortion, a view shared by this court and the Court of Appeals.

The consent decree introduces a new scheme which identifies two types of surgical facilities: those that perform abortions beyond 18 weeks gestational age, or with general, epidural, or spinal anesthesia, or with incisions exposing the patient to a risk of infection; and those that perform abortions within 18 weeks gestational age, under local anesthesia. The former are made subject to a panoply of licensing provisions under the ASTCA and Health Facilities Planning Act. The latter, while still obliged to obtain a license, are

⁶Ragsdale v. Turnock, 625 F. Supp. at 1216. Together with the appellate court's opinion, that decision contains exhaustive discussions of the statutes in question and plaintiffs' challenge to them. The court's task here is not to rehash that material, but rather to ask whether the proposed consent decree fairly addresses the concerns expressed on both sides of the dispute. Since the findings of fact set forth in the Ragsdale decisions are relevant to that inquiry, the court incorporates them in today's opinion.

required to comply with a new set of regulations tailored to those facilities.⁷

This scheme is neither unfair, unreasonable, or inadequate. As counsel for both parties noted during the fairness hearing, the settlement addresses each side's principal concern. To plaintiffs' satisfaction, the decree preserves their constitutional right to have or provide abortions; to defendants' satisfaction, it permits the Department of Public Health to regulate outpatient clinics devoted to abortions and abortion-related procedures. The decree reflects "the essence of settlement," which is "compromise...Each side gains the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory." Hiram Walker, 768 F.2d at 889.

Various objectors insist that the proposed consent decree compromises too much. Family Planning Associates Medical Group (FPA), a major provider of abortion services in Chicago and elsewhere, objects to the provision that subjects an abortion-only surgical facility to full ASTC regulatory requirements if it uses general anesthesia. "That provision," says FPA, "permits the imposition of burdensome and medically unnecessary regulations that would impermissibly infringe on the rights of the physician class to provide abortion services..." FPA brief, p. 2.

FPA's argument is unavailing. General anesthesia is more hazardous than local anesthesia, a fact to which Doctors Ragsdale and Hern, plaintiff and plaintiffs' expert,

⁷The decree does not require a separate license for physicians whose offices are not primarily devoted to providing surgical services, and it does not affect the provision of abortions in hospitals.

respectively, testified. State Defendants' Response, p. 8. Indeed, the Abortion Standards and Guidelines of Planned Parenthood Federation of America, Inc. provide that "[g]eneral anesthesia may not be used in out-of-hospital settings." Id. In view of this distinction between local and general anesthesia, the court cannot conclude that the provision challenged by FPA renders the settlement unfair or unreasonable.

Equally unavailing are suggestions by a number of objectors that Webster v. Reproductive Health Services, Inc., __ U.S. __, 109 S.Ct. 3040 (1989), requires disapproval of the settlement. Webster concerned the use of public facilities and employees to perform abortions, the use of public funding for abortion counseling, and viability testing at 20 weeks gestation. These issues are not involved here. As the state defendants properly observe, "[t]he Webster decision did not provide any definitive pronouncements for purposes of this litigation and did not overrule the previous relevant Supreme Court decisions." State Defendants' Response, p. 9.

Similarly, mere speculation that the Supreme Court might uphold the provisions challenged here in light of Webster will not invalidate the consent decree.⁸ In deciding whether to approve a settlement, "[t]he district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." Hiram Walker, 768 F.2d at 889. Settlement proceedings are not an appropriate occasion for resolving the merits of undecided legal issues. The court declines the in-

⁸To say the Supreme Court might uphold the challenged provisions is doubly speculative. Not only is the substantive law unsettled, but the Court reserved the issue of jurisdiction and may not have reached the merits in this case.

vitiation of some objectors to do so.

Other objectors insist that the consent decree endangers the health and safety of women seeking abortions. There is no evidence to support this contention. To the contrary, in their briefs and at the fairness hearing, counsel for both parties made clear what their intentions were during settlement negotiations: to assure safe and sanitary conditions for abortion procedures while permitting women the opportunity to exercise their constitutional rights. Toward that end, the parties consulted with obstetricians, gynecologists, and other medical and public health experts in drafting the terms of the settlement.⁹

Far from leaving women unprotected, the settlement creates a network of statutes and rules regulating the provision of abortion services. Facilities that provide abortions beyond 18 weeks gestational age or use general anesthesia must comply with the Ambulatory Surgical Treatment Center Licensing Requirements. Facilities that offer abortion services within 18 weeks gestational age, using local anesthesia, must abide by the requirements set forth under subpart G of the ASTCA, "Limited Procedure Specialty Centers." Like any other provider of medical services, abortion providers must comply with standards of conduct generally applicable to the medical profession.¹⁰ Finally, the Clinical

⁹Among those consulted were the American College of Obstetricians and Gynecologists, Planned Parenthood Federation of America, the National Abortion Federation, and other professional societies. The parties also reviewed Williams Obstetrics and other respected medical texts and publications. Stipulation, p. 18.

¹⁰Some objectors complain that the decree puts physicians wholly outside the regulatory powers of the state, but that objection misses the mark. No less than the clinics regulated by the ASTCA, physicians may not violate accepted standards of medical practice when performing abor-

Laboratory Act — and any other present or future legislation not contrary to the consent decree — may be applied to providers of abortion services.¹¹

Taken together, these statutes and regulations provide the state with ample authority to safeguard the health and safety of women seeking abortions. That is certainly the view of the Department of Public Health, which is charged with regulating health care in the State of Illinois: "it is the judgment of the medical doctors with the Department of Public Health that the remaining regulations provide a sufficient mechanism by which the Department can regulate and inspect these facilities in order to minimize the risk of harm to patients undergoing surgery at these facilities. This judgment, as well as the goal of regaining regulatory authority is consistent with the stated purpose of the ASTC Act to promote safe and adequate treatment." State Defendants' Response, p. 7 (citation omitted).

There remain two objections to the proposed consent decree worth discussing. A handful of state's attorneys contend that the defendant class to which they belong was not adequately represented during settlement negotiations. In support of this charge, the objectors refer obliquely to "information" culled from their review of the settlement proceedings which they regard as evidence of inadequate representation. They consider the behavior of their class

tions.

Moreover, the decree leaves the Legislature free to amend the Medical Practice Act or to enact legislation specifically regulating physicians' offices.

¹¹The consent decree does not, as some objectors contend, purport to bind future actions of the General Assembly. The decree specifically applies only to the challenged statutes as presently enacted. If those statutes are amended or new statutes passed, the decree does not affect their enforcement.

representative so suspect that, even if it does not require rejection of the proposed settlement, it warrants further discovery.

Their charge is without merit. On November 8, 1989, this court ordered the State's Attorney of Cook County, or his representative, to participate in settlement negotiations. Assistant State's Attorney Harold E. McKee, III, was assigned to the case. At the fairness hearing, plaintiffs and defendants alike attested to the vigor and frequency of Mr. McKee's participation in the negotiations. He "attend[ed] and participate[d] in all settlement negotiations...participated in drafting the proposed settlement and consent decree, represented the class interest in maintaining the ability to prosecute future violations under the settled acts, and also participated in the briefings held for the benefit of the news media..." State's Attorney Partee's Response, p. 4. The court finds his representation adequate and denies the Motion for Leave to Take Discovery brought by Dennis Schumacher, Greg McClintock, Samuel Naylor, and Stephen L. Reed, state's attorneys for Ogle, Warren, Hancock, and Henderson counties, respectively.

Finally, some objectors challenge the consent decree because it would expose defendants to a claim for attorney's fees. But the consent decree expressly reserves the issue of attorney's fees for resolution at a later date:

The plaintiffs' entitlement to, and the amount of, any counsel fees and reimbursement of disbursements and expenses to be paid by the defendants shall be determined by the District Court upon proper application by the plaintiffs after the entry of the Consent Decree and final judgment.

Settlement Agreement, p. 5. Any objections regarding fees made at this time are premature.

The parties' Stipulation discusses this and nearly every other aspect of these settlement proceedings. Although far too detailed for full discussion here, some elements of the Stipulation deserve mention. Beginning with page 7, for instance, the Stipulation comprehensively reviews the procedural history behind the consent decree. The court incorporates that review in this opinion. Further, the Stipulation identifies several factors which may be used to decide whether a settlement is fair, including the strength of plaintiffs' case versus the settlement offer; the complexity and expense of further litigation; the reaction of class members to the settlement; the opinion of competent counsel; and the stage of proceedings and amount of discovery completed. Stipulation, p. 27.

Without launching into full analysis of these factors here, the court notes that it considered them all in reaching its holding today. The consent decree offers plaintiffs, by their own admission, "permanent injunctive relief similar...to that which they sought in this litigation..." (Stipulation, p. 28); further litigation could prove lengthy and expensive; few class members objected to the settlement; counsel were clearly well-informed and represented their clients zealously; and the settlement agreement arose late in the proceedings, after thorough discovery had been completed. These and other factors considered by the court are more fully explained by the parties in the Stipulation.

For the foregoing reasons, the court finds the proposed consent decree lawful, fair, reasonable, and adequate. Accordingly, the court grants the parties' joint motion for approval of the settlement, and enters the consent decree herewith.

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: March 22, 1990

CONSENT DECREE

I. HISTORY OF THE LITIGATION

This class action litigation was commenced as a civil rights case on June 28, 1985, by named Plaintiffs Richard M. Ragsdale, M.D., Margaret Moe, R.N., the Northern Illinois Women's Center, Sarah Roe and Jane Doe, under 42 U.S.C. sections 1983 and 1988, and 28 U.S.C. sections 2201 et seq. Plaintiffs claimed that the challenged Illinois statutes and regulations, which included (1) the Medical Practice Act, ("MPA") Ill. Rev. Stat. ch. 111 section 4433 (a)-(e) (since recodified at Ill Rev. Stat. ch. 111 section 4400-22(1)), (2) the Ambulatory Surgical Treatment Center Act ("ASTC Act"), Ill. Rev. Stat. ch. 111 1/2 sections 157-8.1 to 157-8.16 and regulations promulgated thereunder, and (3) the Health Facilities Planning Act ("HFP Act"), Ill. Rev. Stat. ch. 111 1/2 sections 1151 to 1168, impermissibly restricted the performance of first and second trimester abortions and thus allegedly violated rights secured by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

A. Parties

1. Plaintiffs

Plaintiff Richard M. Ragsdale, M.D., is a physician, licensed to practice in Illinois, who is the Director of the Northern Illinois Women's Center. At the time the complaint was filed and at the present, Dr. Ragsdale performs abortions for his women patients who seek such medical

care. Plaintiff Margaret Moe is a registered nurse and the sole owner and executive director of a medical facility in Cook County, Illinois. Ms. Moe employs licensed physicians and she sought to offer abortion services at her facility. Plaintiffs Sarah Roe and Jane Doe are patients of Dr. Ragsdale who had sought and received an abortion from Dr. Ragsdale and who may need or desire another abortion in the future.

The named plaintiffs brought this lawsuit on their own behalf, on behalf of a class of physicians who perform or desire to perform abortions in the State of Illinois, and on behalf of a class of Illinois women who desire abortion services. In orders issued on November 27, 1985 and on December 11, 1985, this Court certified the following plaintiff classes pursuant to Rule 23(b) of the Federal Rules of Civil Procedure:

(a) A plaintiff class consisting of all physicians and surgeons who perform or desire to perform abortions in the State of Illinois; [and]

(b) A plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sometime in the future[.]

2. Defendants

Defendant Bernard J. Turnock, M.D., is the Director of the Department of Public Health of the State of Illinois and was sued in his official capacity. He is responsible for the enforcement of the ASTC Act and for the promulgation and enforcement of regulations under that Act, and has certain administrative responsibilities under the HFP Act.

Defendant Neil F. Hartigan, Attorney General of the State of Illinois, was sued in his official capacity, in which he is charged with the defense of challenges to the MPA, the ASTC Act and the HFP Act, and their respective regulations, throughout the State of Illinois. In addition, as chief legal officer of the state, the Attorney General represents the directors of state agencies in their enforcement activities, and upon referral by these agencies, has certain enforcement responsibilities on behalf of these agencies.

Defendant Gary L. Clayton was sued in his official capacity as the Director of the Illinois Department of Registration and Education. As such Mr. Clayton, and his successor in office at the successor agency, Robert C. Thompson, the Acting Director of the Department of Professional Regulation, is empowered to implement, administer, and enforce the MPA.

Defendant Richard M. Daley was sued in his official capacity as State's Attorney of Cook County, and as the representative of the defendant class of all state's attorneys of the 102 counties of the State of Illinois. Under the ASTC Act, the Director of the Department of Public Health may, through the State's Attorney of the county in which the violation occurs, seek injunctions to restrain violations of the ASTC Act or its regulations, or enjoin future operation of any ambulatory surgical treatment center ("ASTC") violating the ASTC Act or its regulations. Under the HFP Act, state's attorneys may prosecute persons in violation of the Act for committing a business offense.

In orders issued on November 27, 1985 and on December 11, 1985, this Court certified the following defendant class pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure:

"A defendant class consisting of all State's Attorneys in the State of Illinois."

Richard M. Daley, as the State's Attorney of Cook County, was named as representative of this defendant class. Richard M. Daley has been succeeded in office by Cecil A. Partee, who pursuant to Rule 25(d), F.R.Civ.P., has been automatically substituted as the named defendant state's attorney and as representative of the defendant class of state's attorneys.

B. Jurisdiction

This Court concludes that it has jurisdiction of this action under 28 U.S.C. section 1343. Venue is proper in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. section 1391.

C. The Claims

In their Complaint, plaintiffs alleged that the challenged statutes and regulations impermissibly restricted the ability of physicians to perform and the ability of women to secure first and second trimester abortions. Plaintiffs claimed that the laws singled out abortions for a discriminatory level of regulation and, further, required that all abortions performed in Illinois be performed in a hospital, or its functional equivalent—an ASTC. Plaintiffs thus alleged that the laws violated plaintiffs' right of privacy as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution and the penumbra of the Bill of Rights. Plaintiffs also alleged that the challenged provisions deprived Dr. Ragsdale and other physicians of their asserted right to practice medicine free from vague, arbitrary, irrational and burdensome regulations, in violation of the equal protection clause of the Fourteenth Amendments to the Uni-

ted States Constitution, and that the provisions similarly prevented Margaret Moe from operating her facility free from vague, arbitrary, irrational and burdensome regulations, in violation of the equal protection clause of the Fourteenth Amendment. Plaintiffs sought declaratory and injunctive relief from the enforcement of the challenged provisions.

Defendants filed an Answer which denied each and every allegation of the Complaint, except as otherwise responded to. Defendants specifically denied each and every allegation that the laws, as written or as enforced, violated any of plaintiffs' rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Defendants argued that the challenged statutes and regulations reflected accepted medical, health, safety, and construction standards for outpatient surgical facilities. In addition, defendants contended that the challenged provisions appropriately furthered the State's interests in protecting the health, safety and welfare of women who choose to have abortions in such facilities.

D. The Preliminary Injunction

Following an evidentiary hearing and a review of the pleadings and other written evidence submitted by the parties, this Court granted plaintiffs' Motion for a Preliminary Injunction in orders issued on November 27, 1985 and on December 11, 1985. The Court enjoined the defendant class members and the individual defendants Bernard J. Turnock, Neil F. Hartigan, and Gary Clayton (hereafter collectively referred to as "defendants"), in their official capacities, and defendants' successors, officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from enforcing section 4433 (1) (a)-(e) (now section 22 (1) (a)-(e)) of the MPA, the

ASTC Act and any rules and regulations promulgated thereunder, or the HFP Act, against any person or facility to the extent such person or facility offers or performs, or desires to offer or perform first or early second trimester abortions or other abortion-related gynecological procedures, such as a dilation and curettage.

On March 10, 1988, the United States Court of Appeals for the Seventh Circuit upheld the Preliminary Injunction, except insofar as the challenge to one provision was determined to be moot. The Court of Appeals subsequently denied defendants' petition for rehearing and suggestion for rehearing en banc on August 12, 1988.

Thereafter, defendants Turnock, Hartigan, and Stephen Selcke, then-director of the Department of Professional Regulation and successor to defendant Clayton, filed a Notice of Appeal, seeking review by the Supreme Court of the United States.

II. RESOLUTION OF DISPUTED ISSUES

This Consent Decree is the result of negotiation and settlement. Defendants deny the allegations in the Complaint and specifically deny that the challenged provisions and their enforcement of them violates the constitutional or other legal rights of the plaintiff classes. Nothing herein shall be considered an admission of fault of any kind by the defendants, nor shall anything herein be considered a reflection of any weakness of proof by the plaintiffs.

The parties are desirous of avoiding further protracted and costly litigation and therefore have agreed that this controversy should be resolved by settlement and without further evidentiary hearings. In addition, the defendants desire to expeditiously regain the State's authority to license

and regulate outpatient surgical facilities in which abortions are performed and to implement and enforce regulations as to such facilities. Accordingly, as indicated by the signatures below, the parties have agreed to the entry of this Consent Decree.

This Consent Decree and judgment shall constitute a final resolution of all of the claims for declaratory and injunctive relief asserted in the complaint, with the reservation of plaintiffs' claims for attorney's fees, costs, and expenses, and shall be binding upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them, including: the defendants, their agents and employees, and their successors in office, the defendant class of state's attorneys, and upon the named plaintiffs and all persons in the classes they represent. The plaintiffs' entitlement to, and the amount of, any counsel fees and reimbursement of costs and expenses shall be determined by the Court upon proper application by the plaintiffs after entry of this Decree. Defendants retain their right to object to such application submitted by plaintiffs. The parties also may resolve the plaintiffs' claim to fees, costs and expenses by agreement.

Plaintiffs and defendants agree to the dissolution of the Preliminary Injunction and to the entry of this Consent Decree as a Permanent Injunction.

III. FINDING OF FAIRNESS AND ADEQUACY

The Court, having held a hearing pursuant to court-ordered notice to the plaintiff and defendant classes in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, hereby finds that the terms of this Consent Decree provide for a fair, adequate, and reasonable settle-

ment of the claims for declaratory and injunctive relief asserted in the complaint, with the exception of plaintiffs' claims for attorney's fees, costs and expenses. The Court thereby dissolves the Preliminary Injunction and enters this Consent Decree as a Permanent Injunction, the injunctive terms of which are set forth in section IV.

IV. JUDGMENT AND PERMANENT INJUNCTION

NOW, THEREFORE, upon the consent of the parties and approval of this Court, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

[SEE ATTACHMENT A FOR THE INJUNCTIVE PORTION OF THIS CONSENT DECREE]

V. COMPLIANCE

Class members shall be given at least 6 months from the date of approval of this Consent Decree to bring their facility into compliance with the terms of the Consent Decree or any new regulations promulgated by the Department of Health, pursuant to this decree, governing the provision of abortion services.

ORDERED THIS 22 day of March, 1990.

ENTER:/s/ John A. Nordberg
United States District Judge

Approved:

One of the Attorneys for
the Plaintiff Class:
/s/ Colleen K. Connell

Bernard J. Turnock, M.D.,
Director, Illinois
Department of Public Health

Defendant Neil F. Hartigan
Attorney General of Illinois

One of the Attorneys for
Cecil A. Partee State's Attorney
of Cook County and the defendant
class of State's Attorneys

Kevin K. Wright,
Director, Illinois
Department of Professional
Regulation

ATTACHMENT A

INJUNCTION PORTION OF CONSENT DECREE

1. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys, and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to criminal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, any of the statutes set forth in subparagraphs (A) and (B) below against any person or facility offering or performing abortions:

A. Section 157-8.3(A) (section 3) of the Ambulatory Surgical Treatment Center Act ("ASTC Act"), Ill. Rev. Stat. ch. 111-1/2, pars. 157-8.3(A), to the extent that Ambulatory Surgical Treatment Center is defined as any facility in which a medical or surgical procedure is utilized to terminate a pregnancy.

B. Section 22(1)(a)-(e) of the Medical Practice Act. Ill. Rev. Stat. ch. 111.

2. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys, and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to criminal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, against any licensed Ambulatory Surgical Treatment Center ("ASTC"), the following provisions of the Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill. Admin. Code, Section 205, subchap. b: (1) 205.710, (2) 205.720, (3) 205.730(a)(3) and (b), (4) 205.740, and (5) 205.760, and, if such facility provides only abortions and related gynecological procedures, (6) 205.120(b)(5)-(7), and (7) 205.125(b)(5)-(7), to the extent that, provided that all information required under said sections is maintained at the ASTC, the application required by said sections need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

3. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys, and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to cri-

minal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, any of the statutes or regulations set forth in subparagraphs (A) and (B) below against any person or facility offering or performing abortions within 18 weeks assessed gestational age, with only local, and not general, epidural, or spinal anesthesia, without incisions or other techniques which expose a person to risk of infection from airborne bacteria, and gynecological procedures related to such abortions, in an ASTC whose surgical procedures are limited to the performance of such abortions and gynecological procedures related to such abortions:

A. Sections 1152-1168 of the Health Facilities Planning Act, Ill. Rev. Stat. ch. 111-1/2, pars. 1152-1168.

B. The following provisions of the Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill. Admin. Code, Section 205, subchap. b:

(1) 205.120(b)(5)-(7) - Licensure, enjoined to the extent that, provided that all information required under said section is maintained at the ASTC, the application need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

(2) 205.125(b)(5)-(7) - Application for License Renewal, enjoined to the extent that, provided that all information required under said section is maintained at the ASTC, the application need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

(3) 205.520(c) - Preoperative Care, enjoined to the extent said section requires tests to be performed by a quali-

fied laboratory technician. (Relevant legal requirements regarding laboratory tests are found in the Clinical Laboratory Act, Ill. Rev. Stat. ch. 111-1/2, Sections 621-103 et seq.)

(4) 205.330 - Nursing Personnel, enjoined to the extent that "surgical experience" as used in said section may be interpreted to exclude experience gained in a clinical facility providing abortion procedures.

(5) 205.410(c) - Equipment, enjoined to the extent that said section requires an ASTC that does not use inhalation anesthetic or medical gas to have written procedures to insure the safety in use or storage of such substances, provided that if intravenous sedation is used in accordance with the ASTC's program narrative, mechanical ventilation devices and intubation equipment must be available on site.

(6) 205.540(c)(1)-(3) - Post Operative Care, enjoined to the extent the requirements of said section would apply in circumstances where (1) no licensed hospital within 15 minutes from the ASTC ("nearby hospital") will allow admitting or practice privileges to abortion providers and (2) either the ASTC has a transfer agreement with a nearby hospital, or a physician practicing at the ASTC or the medical director of the ASTC has a professional working relationship or agreement, maintained in writing at the ASTC and verifiable by IDPH, with a physician who does have admitting or practice privileges at a nearby hospital, so as to assure availability of patient care in the event of medical complications ensuing from an abortion or a gynecological procedure related to an abortion.

(7) 205.710 - Abortions, enjoined.

(8) 205.720 - Personnel, enjoined.

(9) 205.730 - General Patient Care, 730(a)(1), enjoined to the extent that said section requires any examination beyond a determination of the patient's blood Rh factor; 730(a)(3), enjoined; and 730(b), enjoined.

(10) 205.740 - Pre-operative Requirements, enjoined.

(11) 205.760 - Reports, enjoined.

(12) 205.1310(a) - Plant and Service Requirements, enjoined to the extent that said section requires that a proposed ASTC meet any requirements enjoined or not permitted pursuant to the provisions of this decree.

(13) 205.1320 (a)(1) - General Considerations, enjoined to the extent that said section requires any physical marking that denotes the facility as an ASTC.

(14) 205.1350 - Admission Department and Public Areas, enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2, Section 3711.

(15) 205.1360 - Clinical Facilities, 1360(a)(1) [examination room], enjoined to the extent said section would require that the examination room (which need not be separate from the procedure room) be larger than minimally adequate to accommodate the equipment required for the examination, to facilitate the examination safely, and to allow unobstructed ingress and egress to and from the room through the door that, if locked, can be opened from within the room;

.1360(b)(1) [procedure room], enjoined to the extent said sec-

tion would require a room larger than 120 square feet with a minimum dimension of at least 10 feet unless the ASTC demonstrates that a smaller room size is minimally adequate to accommodate all equipment required for the procedures, to perform the procedures safely, and to protect patients and staff in the event of fire or other emergency;

.1360(b)(2) [communication system], enjoined;

.1360(c)(2) [recovery room], enjoined to the extent said section would require a room larger than is necessary to accommodate the recovery beds or lounge chairs in the room, with a minimum of three feet between each bed or chair and an unobstructed passageway of a minimum of four feet clearance at one end each bed or chair;

.1360(c)(3) [drug distribution station, hand washing facility, charting facility, nurses' station and storage space for supplies and equipment], enjoined except that the ASTC must provide for direct visual supervision of the patients' recovery area;

.1360(c)(4) [toilet specifications], enjoined to the extent said section would require the inclusion of a toilet, a gray diverter valve or a fluid waste disposal in the recovery room if a toilet is reserved for only patient use and does not require recovery room patients to enter public areas or other patient care areas to access the toilet; and

.1360(c)(7) [minimum of four recovery beds or lounge chairs], enjoined to the extent said section would require the inclusion of more than three recovery beds or lounge chairs for each procedure room unless the ASTC's narrative program provides that no more than two Procedures per hour will be performed per procedure room, in which case a minimum of two recovery beds or lounge chairs for each procedure

room is required.

(16) 205.1370 - Support Services,

.1370(a) [control station], enjoined;

.1370(d) [scrub stations], enjoined to the extent said section requires a separate scrub station outside of the procedure room, provided that the procedure room contains a sink with handwashing capabilities;

.1370(e) [soiled workroom], enjoined to the extent that the section requires more than closed clean storage which prevents contamination by soiled materials and for separate storage and handling of soiled materials;

.1370(f) [fluid waste disposal], enjoined to the extent said section requires more than a toilet with a gray diverter valve, a sink exclusively used for fluid waste disposal, or a separate fluid waste disposal unit;

.1370(g) [workroom or supply room], enjoined to the extent said section requires more than facilities for closed clean storage;

.1370(h) [anesthesia storage], enjoined;

.1370(i) [medical gas storage], enjoined;

.1370(k) [changing areas -- staff], enjoined to the extent that the section requires more than minimally adequate space for any changing or gowning required by the specific procedures that are being performed in accordance with the ASTC's narrative program;

.1370(1) [changing areas -- patients], enjoined; and

.1370(n) [janitor's closet], enjoined to the extent that the section requires more than minimally adequate space for storage of cleaning supplies.

(17) 205.1380(b)(3) and (4) - Diagnostic Facilities, enjoined.

(18) 205.1400 - Details and Finishes,

.1400(a)(1) [minimum corridor width], enjoined to the extent said section would require that the width of corridors in an ASTC exceed five feet;

.1400(b)(3) [minimum door width], enjoined to the extent said section would require that the width of any doors in an ASTC exceed three feet;

.1400(d)[thresholds flush], enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2 Section 3711;

.1400(n) [ceiling finish], enjoined to the extent said section requires ceilings to be readily washable and without crevices, if ceilings are otherwise cleanable;

(19) 205.1410(d)(1) - Construction, Including Fire-Resistive Requirements, enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2 Section 3711.

(20) 205.1540(a)-(q) and Table A = Air conditioning, Heating and Ventilating Systems, enjoined to the extent

that said section requires more than that temperature be maintained between 68° and 80° Fahrenheit.

(21) 205.1750(b) - Receptacles, enjoined.

4. Following the entry of the Consent Decree, (1) defendants may enforce those specific portions of the Medical Practice Act ("MPA"), the Health Facilities Planning Act ("HFPA"), and the Ambulatory Surgical Treatment Center Act ("ASTCA") not enjoined herein; (2) defendants shall not enforce Section 22(1)(a)-(e) of the MPA as presently codified; (3) defendants' enforcement and non-enforcement of Sections 1152-1168 of the HFPA as presently codified shall be consistent with the injunctions set forth in paragraphs 1 through 3 above; and (4) defendants' future regulation under and enforcement and non-enforcement of the present provisions of the ASTCA shall be consistent with the injunctions and specifications in paragraphs 1 through 3 above, and further shall be limited as follows:

(A) With respect to any person or facility that offers or performs abortions in any ASTC described in paragraphs 2 and 3 above, defendants may promulgate and enforce regulations implementing the requirements of paragraphs 2 and 3 above ("implementing regulations");

(B) With respect to any person or facility that offers or performs abortions in any ASTC described in paragraph 3 above, defendants may promulgate, implement and enforce future regulations under the ASTCA, which are different from and additional to the requirements in paragraph 3 and the implementing regulations ("paragraph 3 future regulations") only when a change in medical or scientific knowledge requires paragraph 3 future regulations in order to insure against a significant health or safety risk to the welfare of a woman undergoing an abortion as permitted in

such ASTC, and further provided that no paragraph 3 future regulations shall (i) restrict access to the procedure, either by materially increasing the cost of the procedure or materially reducing the number of facilities without resulting in more than a marginal increase in safety; (ii) interfere with the safety of the procedure as determined by accepted medical practice; or (iii) prevent a physician from exercising medical discretion, within accepted medical practice and within the scope of the facility, to provide a patient with appropriate care given the unique circumstances presented by her health situation; and

(C) With respect to any person or facility performing an abortion in any ASTC described in paragraph 2 above, defendants may promulgate, implement and enforce future regulations which govern all such ASTCs ("paragraph 2 future regulations"), however, if any paragraph 2 future regulations are specifically directed at the abortion procedure, as opposed to all procedures done in such facility, defendants may promulgate, implement and enforce such paragraph 2 regulations only when a change in medical or scientific knowledge requires paragraph 2 future regulations in order to insure against a significant health or safety risk to the welfare of a woman undergoing an abortion as permitted in such ASTC, and further provided that no paragraph 2 future regulations shall (i) restrict access to the procedure, either by materially increasing the cost of the procedure or materially reducing the number of facilities without resulting in more than a marginal increase in safety; (ii) interfere with the safety of the procedure as determined by accepted medical practice; or (iii) prevent a physician from exercising medical discretion, within accepted medical practice and within the scope of the facility to provide a patient with appropriate care given the unique circumstances presented by her health situation.

5. With respect to the number of weeks assessed gestational age set forth in paragraph 3 and 4 above, the parties stipulate that said figure has been determined by the Illinois Department of Public Health and is based on an assessment of risk to the health and safety of women as evidenced by available published data, present surgical and medical procedures commonly used and constituting acceptable medical practice, and the standards and guidelines of professional medical and health organizations. Following the entry of this Consent Decree, the plaintiffs and the Director of the IDPH expressly reserve the right to seek modification by the Court of said figure upon a showing that the further development of medical or scientific knowledge, including the basis of assessment set forth above, evidences that abortions and related gynecological procedures may be or should be performed within a different number of weeks in the facilities defined in paragraph 3, on the basis that such a change would not pose or will eliminate a significant risk to the health or safety of women obtaining such services.

6. The Court retains jurisdiction to enforce compliance with the provisions of this Consent Decree.

* * *

APPENDIX C

(Entered March 22, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

JUDGMENT

Judgment is entered as follows: Enter memorandum opinion and order finding the proposed consent decree lawful, fair, reasonable and adequate. Accordingly, the court grants the parties' joint motion for approval of the settlement, and enters the consent decree herewith. (For further detail see order attached to the original minute order form).

**ENTER: /s/ John A. Nordberg
United States District Judge**

Dated: March 22, 1990

APPENDIX D

(Entered April 19, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Hearing held on Craig H. Greenwood, attorney for Ritaellen M. Murphy and Penny R. Greenwood's petition to clarify. Per oral ruling court denies Craig H. Greenwood's petition to file his appearance. Court supplements the memorandum opinion and order stating that additional time to February 13, 1990 was given to file objections.

**ENTER: /s/ John A. Nordberg
United States District Judge**

Dated: April 19, 1990

APPENDIX E

(Filed April 20, 1990)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that KENNETH M. REED, as Expectant Father and Next Friend of BABY REED, and MARK I. AUGHENBAUGH, as Expectant Father and Next Friend of BABY AUGHENBAUGH, proposed Intervenors as of right, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MINUTE ORDER dated and entered in this action on the 5th day of March, 1990, and MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990.

Respectfully submitted,
/s/ Kenneth M. Reed
/s/ Mark I. Aughenbaugh

APPENDIX F

(Filed April 20, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that RITAELLEN M. MURPHY and PENNY R. GREENWOOD, members of the Plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sometime in the future, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990.

Respectfully submitted,
/s/ Ritaellen M. Murphy
/s/ Penny R. Greenwood

APPENDIX G

(Filed May 18, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that KENNETH M. REED, as Expectant Father and Next Friend of BABY REED, and MARK I. AUGHENBAUGH, as Expectant Father and Next Friend of BABY AUGHENBAUGH, proposed Intervenor as of right, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MINUTE ORDER dated and entered in this action on the 5th day of March, 1990, MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990, and the minute order entered on the 19th day of April, 1990.

Respectfully submitted,
/s/ Kenneth M. Reed
/s/ Mark I. Aughenbaugh

APPENDIX H

(Filed May 18, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that RITAELLEN M. MURPHY and PENNY R. GREENWOOD, members of the Plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sometime in the future, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990, and the minute order entered on the 19th day of April, 1990.

Respectfully submitted,
/s/ Ritaellen M. Murphy
/s/ Penny R. Greenwood

APPENDIX I

(Entered May 21, 1990)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907 and 90-1908

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

Counsel for all parties are ordered to meet with the court's Senior Staff Attorney, Donald J. Wall, in the court's Auxiliary Courtroom at 9:00 a.m. on May 31, 1990 to discuss coordinating the briefing in order to avoid burdening the court with duplicative briefs.

Briefing on the merits shall be HELD IN ABEY-
ANCE pending further court order of this court.

APPENDIX J

(Entered June 7, 1990)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS**

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

On May 31, 1990, the parties to these appeals had a conference with Donald J. Wall, Senior Staff Attorney for the Court; a telephone conference call with the same parties was held on June 4, 1990. As a result, the following matters were agreed to, and IT IS SO ORDERED:

The briefing schedule is as follows:

1. The appellants shall file their joint consolidated brief and required short appendix on or before July 9, 1990.
2. The appellees shall file their respective consolidated briefs on or before August 15, 1990.
3. The appellants shall file their joint consolidated reply brief, if any, on or before September 5, 1990.

Counsel for appellees are encouraged to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-appellee's brief. Duplicative briefing will be stricken and may result in disciplinary sanctions against counsel.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

APPENDIX K

(Entered July 9, 1990)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Hearing held on Craig Greenwood's motion for leave to supplement the record on appeal. Per oral ruling, court denies motion to supplement the record.

APPENDIX L

(Entered August 20, 1990)
(Corrected August 22, 1990)

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

Before Hon. WILLIAM J. BAUER, Chief Judge, Hon.
WALTER J. CUMMINGS, Circuit Judge, Hon.
HARLINGTON WOOD, JR., Circuit Judge, Hon. RICHARD
D. CUDAHY, Circuit Judge, Hon. RICHARD A. POSNER,
Circuit Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon.
JOEL M. FLAUM, Circuit Judge, Hon. FRANK H.
EASTERBROOK, Circuit Judge, Hon. DANIELA. MANION,
Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

This matter comes before the court for its consideration of the "SUGGESTION FOR HEARING EN BANC" filed herein on August 1, 1990, by counsel for the appellants. Upon consideration by the active members of this court.*

IT IS ORDERED that the Suggestion for Hearing En Banc is DENIED.

*Judge Ripple took no part in this matter.

APPENDIX M

August 15, 1990 Amendments to Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill.Adm.Code, Ch. 1, Sec. 205

DEPARTMENT OF PUBLIC HEALTH

NOTICE OF ADOPTED AMENDMENTS

TITLE 77: PUBLIC HEALTH CHAPTER I: DEPARTMENT OF PUBLIC HEALTH SUBCHAPTER b: HOSPITAL AND AMBULATORY CARE FACILITIES

PART 205 AMBULATORY SURGICAL TREATMENT CENTER LICENSING REQUIREMENTS

SUBPART A: GENERAL

Section	
205.110	Definitions
205.115	Incorporated and Referenced Materials
205.118	Conditions of Licensure
205.120	Application for Initial Licensure
205.125	Application for License Renewal
205.130	Approval of Surgical Procedures

SUBPART B: OWNERSHIP AND MANAGEMENT

Section	
205.210	Ownership, Control and Management

- 205.220 Organizational Plan
- 205.230 Standards of Professional Work
- 205.240 Policies and Procedures Manual

SUBPART C: PERSONNEL

Section

- 205.310 Personnel Policies
- 205.320 Presence of Qualified Physician
- 205.330 Nursing Personnel
- 205.340 Basic Life Support
- 205.350 Laboratory Services ~~Ambulatory Surgical Treatment Center~~

SUBPART D: EQUIPMENT, SUPPLIES, AND FACILITY MAINTENANCE

Section

- 205.410 Equipment
- 205.420 Sanitary Facility

SUBPART E: GENERAL PATIENT CARE

Section

- 205.510 Emergency Care
- 205.520 Preoperative Care
- 205.530 Operative Care
- 205.540 Postoperative Care

SUBPART F: RECORDS AND REPORTS

Section

- 205.610 Clinical Records
- 205.620 Statistical Data

SUBPART G: LIMITED PROCEDURE
SPECIALTY CENTERS
~~ADDITIONAL REQUIREMENTS FOR FACILITIES~~
~~IN WHICH OBSTETRICAL/GYNECOLOGICAL~~
~~PROCEDURES ARE PERFORMED~~

Section

- 205.710 Pregnancy Termination Specialty Centers
Abortions
- 205.720 Personnel (Repealed)
- 205.730 General Patient Care (Repealed)
- 205.740 Preoperative Requirements (Repealed)
- 205.750 Postoperative Requirements (Repealed)
- 205.760 Reports (Repealed)

SUBPART H: PROCEDURES FOR
INVESTIGATION OF COMPLAINTS

Section

- 205.810 Complaints
- 205.820 Acknowledgement of Complaint
- 205.830 Investigation
- 205.840 Prompt Investigation
- 205.850 Methods
- 205.860 Notification of Results

SUBPART I: BUILDING DESIGN,
CONSTRUCTION STANDARDS,
AND PHYSICAL REQUIREMENTS

Section

- 205.1310 Plant and Service Requirements
- 205.1320 General Considerations
- 205.1330 New Construction, Additions and Major
Alterations
- 205.1340 Minor Alterations and Remodeling Changes

- 205.1350 Administration Department and Public Areas
- 205.1360 Clinical Facilities
- 205.1370 Support Service Areas
- 205.1380 Diagnostic Facilities
- 205.1390 Other Building Services
- 205.1400 Details and Finishes
- 205.1410 Construction, Including Fire Resistive Requirements

SUBPART J: MECHANICAL

Section

- 205.1510 General
- 205.1520 Thermal and Acoustical Insulation
- 205.1530 Steam and Hot Water Systems
- 205.1540 Air Conditioning, Heating and Ventilating Systems

SUBPART K: PLUMBING AND OTHER PIPING SYSTEMS

Section

- 205.1610 General
- 205.1620 Plumbing Fixtures
- 205.1630 Water System
- 205.1640 Drainage Systems
- 205.1650 Identification

SUBPART L: ELECTRICAL

Section

- 205.1710 General
- 205.1720 Switchboards and Power Panels
- 205.1730 Panelboards
- 205.1740 Lighting
- 205.1750 Receptacles (Convenience Outlets)

- 205.1760 Grounding
- 205.1770 Equipment Installation in Special Areas
- 205.1780 Emergency Electric Service
- 205.1790 Fire Alarm System

205.TABLE A General Pressure Relationships and
Ventilation Rates of Ambulatory Surgery
Area

AUTHORITY: Implementing and authorized by the
Ambulatory Surgical Treatment Center
Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par.
157-8.1 et seq.)

SOURCE: Amended July 18, 1974; emergency
amendment at 3 Ill. Reg. 10. p. 43. effec-
tive February 23, 1979, for a maximum of
150 days; amended at 3 Ill. Reg. 30, p.
371, effective July 23, 1979; amended at
5 Ill. Reg. 12756, effective November 4,
1981; amended at 6 Ill. Reg. 6220, 6225,
and 6226, effective May 17, 1982;
amended at 6 Ill. Reg. 10974, effective
August 30, 1982; amended at 6 Ill. Reg.
13337, effective October 20, 1982;
amended at 7 Ill. Reg. 7640, effective
June 14, 1983; codified at 8 Ill. Reg.
9367; amended at 9 Ill. Reg. 12014,
effective July 23, 1985; amended at 10 Ill.
Reg. 8806, effective June 1, 1986;
amended at 10 Ill. Reg. 21906, effective
January 15, 1987; amended at 11 Ill. Reg.
14786, effective October 1, 1987;
amended at 12 Ill. Reg. 3743, effective
February 15, 1988; amended at 12 Ill.
Reg. 15573, effective October 1, 1988;

amended at 13 Ill. Reg. 16025. effective November 1, 1989; emergency amended at 14 Ill. Reg. 5596, effective March 26, 1990, for a maximum of 150 days; amended at 14 Ill. Reg. ____, effective August 15, 1990.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL

Section 205.120 Application for Initial Licensure

a) AN APPLICATION FOR LICENSE SHALL BE MADE TO THE DEPARTMENT ON FORMS PROVIDED BY THE DEPARTMENT (Section 5 of the Act). The application shall be submitted not less than sixty days prior to the date of intended operation and shall contain the information required under the Act and this Part.

b) The initial application shall include the following information:

1) The names and addresses of all persons who own the facility, any names under which any of these persons do business, and the type of ownership of the facility (for example, individual, partnership, corporation, or association). In addition, a corporation shall submit:

A) A copy of its certificate of incorporation.

B) A list of the title, name and address of each of its corporate officers.

- C) A list of the name and address of each of its shareholders holding more than five percent of the shares.
- 2) The names and addresses of all persons under contract to manage or operate the facility.
- 3) The location of the facility.
- 4) Information regarding any conviction of the applicant, or if the applicant is a firm, partnership or association, of any of its members, or if the applicant is a corporation, of any of its officers or directors, or of the person designated to manage or supervise the facility, of a felony, or of two or more misdemeanors involving moral turpitude in the last five years.
- 5) The name, address, telephone number, education, experience, credentials and any professional licensure or certification of the following persons:
- A) Administrator.
 - B) Medical Director.
 - C) Supervising Nurse.
- 6) A list of the medical staff including name, ~~address,~~ ~~telephone number,~~ specialty and license number.
- 7) A list of all staff personnel including name, ~~address,~~ ~~telephone number,~~ position, education, experience, and any professional licensure or certification.
- 8) A narrative description of the facility including but not limited to interviewing, examination, surgi-

cal and recovery room facilities.

9) A description of services to be provided by the facility including a list of surgical procedures to be performed subject to approval in accordance with the requirements of Section 205.130.

10) Documentation of compliance with Section 205.350 of this Part. ~~The name, address, education, experience and certification of the qualified medical technician who will perform required laboratory procedures or a copy of the written agreement with a laboratory, licensed by the Department, to perform the required laboratory procedures.~~

11) A copy of the transfer agreement with a licensed hospital within approximately 15 minutes travel time of the facility or other documentation demonstrating compliance with Section 205.540(d)(e) of this Part.

12) A copy of the organizational plan of the facility (see Section 205.220).

13) Schematic architectural plans.

14) Documentation of a permit as required by the Illinois Health Facilities Planning Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1151 et seq.)

15) Documentation of compliance with all applicable local building, utility, and safety codes.

c) THE APPLICATION SHALL BE SIGNED BY THE APPLICANT AND SHALL INCLUDE A VERIFICATION form acknowledging the application to be true and complete

and certifying that the applicant has knowledge of and understands the action required to comply with the Act and licensing requirements. THE FORM SHALL BE VERIFIED by a notary public. (Section 5 of the Act)

d) THE LICENSE APPLICATION SHALL BE ACCOMPANIED BY A LICENSE FEE OF \$500. (Section 5 of the Act)

(Source: Amended at 14 Ill. Reg. _____, effective August 15, 1990)

Section 205.125 Application for License Renewal

a) Application for license renewal shall be submitted on forms provided by the Department. Application for license renewal shall be submitted to the Department not less than 30 days prior to the expiration date.

b) An application for license renewal shall include the following information:

1) The names and addresses of all persons who own the facility, any names under which any of these persons do business, and the type of ownership of the facility (for example, individual, partnership, corporation, or association). In addition, a corporation shall submit:

A) A list of the title, name and address of each of its corporate officers.

B) A list of the name and address of each of its shareholders holding more than five percent of the shares.

2) The names and addresses of all persons under

contract to manage or operate the facility.

3) The location of the facility.

4) Information regarding any conviction of the applicant, or if the applicant is a firm, partnership or association, of any of its members, or if the applicant is a corporation, of any of its officers or directors, or of the person designated to manage or supervise the facility, of a felony, or of two or more misdemeanors involving moral turpitude during the previous year.

5) The name, address, and telephone number of the administrator, medical director, and supervising nurse. In addition, the education, experience, credentials and any professional licensure or certification of these individuals must also be submitted if this information was not submitted with the initial application or a prior renewal application or if this information has changed since the prior submission.

6) A list of the medical staff including name, ~~address,~~
~~telephone number,~~ specialty and license number.

7) A list of all staff personnel including name, ~~address, telephone number,~~ position, education, experience, and any professional licensure or certification.

8) A list of surgical procedures being performed at the facility. Any new procedures which are included in this list must be identified and are subject to approval in accordance with the requirements of Section 205.130.

c) THE APPLICATION SHALL BE SIGNED BY THE

APPLICANT AND SHALL INCLUDE A VERIFICATION form acknowledging the application to be true and complete and certifying that the applicant has knowledge of and understands the action required to comply with the Act and licensing requirements. THE FORM SHALL BE VERIFIED by a notary public. (Section 5 of the Act)

d) The license renewal application shall be accompanied by A LICENSE RENEWAL FEE OF \$300. (Section 6 of the Act)

(Source: Amended at 14 Ill. Reg. ____, effective August 15, 1990)

SUBPART C: PERSONNEL

Section 205.350 Laboratory Services. Ambulatory Surgical Treatment Center

Each ambulatory surgical treatment center shall meet each ~~have one~~ of the following requirements:

a) Compliance with the requirements of the Department's rules Illinois Clinical Laboratories Code (77 Ill. Adm. Code 450). ~~A qualified medical technician who is certified by the American Society of Clinical Pathologists or is the holder of a letter, certificate, or record from the Bureau of Quality Assurance of the Department of Health, Education, and Welfare that he/she has passed the Federal Proficiency Examination Program for Clinical Laboratory Technologists, to perform required laboratory procedures.~~

b) Have a ~~A~~ written agreement with a laboratory, licensed by the Department under the Department's rules Illinois Clinical Laboratories Code (77 Ill. Adm. Code 450), to perform any required laboratory procedures which are not performed in the center.

(Source: Amended at 14 Ill. Reg. ____, effective August 15, 1990)

SUBPART E: GENERAL PATIENT CARE

Section 205.520 Preoperative Care

a) Where medical evaluation, examination, and referral are made from a private physician's office, hospital, or clinic, pertinent records thereof shall be available and made part of the patient's clinical record at the time the patient is registered and admitted to the ambulatory surgical treatment center.

b) A complete medical history shall be obtained and the physical examination shall be complete. A preanesthetic evaluation shall be completed specifically identifying any patient sensitivity or contraindications to anesthesia.

c) A hemoglobin or hematocrit and examination of the urine for sugar, protein, and acetone shall be performed ~~by a qualified laboratory technician~~ prior to the following procedures:

- 1) those performed with general anesthesia,
- 2) those performed with intravenous sedation,
- 3) those performed with spinal or epidural anesthesia,
- 4) those performed with any other specific anesthesia technique designated by the consulting committee, and
- 5) those performed to terminate pregnancy.

d) Prior to procedures performed to terminate a pregnancy, the physician shall establish the diagnosis of pregnancy by appropriate clinical evaluation and testing. In addition, the patient's blood Rh factor shall be determined.

e) A written statement indicating informed consent and a signed authorization by the patient for the performance of the specific surgical procedure shall be procured and made part of the patient's clinical record.

f) Surgical procedures shall not be performed on patient's having medical, surgical, or psychiatric conditions or complications as specified by the consulting committee in the facility's written policies.

g) Prior to admission to the facility for a surgical procedure the patient shall be informed of the following:

- 1) Patients who receive general anesthesia, intravenous sedation, spinal or epidural anesthesia, or any other specific anesthesia technique designated by the consulting committee, must not attempt to drive a motor vehicle immediately upon discharge from the facility.

- 2) Patients must make arrangements prior to admission for safe transportation from the facility upon discharge to return to home or to a similar environment.

(Source: Amended at 14 111. Reg. ____, effective August 15, 1990)

Section 205.540 Postoperative Care

a) Patients shall be observed in the facility for a period of

time sufficient to ensure that the patient is awake, physiologically stable, manifests no immediate postoperative complications, and is ready to return to home or to a similar environment. No patient shall be required to leave the center in less than one (1) hour following the procedures.

b) Rh factor sensitization prophylaxis shall be provided to all Rh negative patients following procedures performed to terminate pregnancy, in accordance with standard medical procedure.

c) ~~d~~) Patients in whom a complication is known or suspected to have ~~occured~~ occurred during or after the performance of a surgical procedure, shall be informed of such condition and arrangements made for treatment of the complication. In the event of admission to an inpatient facility a summary of care given in the ambulatory surgical treatment center concerning the suspected complication shall accompany the patient.

d) ~~e~~) To insure availability of follow-up care at a licensed hospital, the ambulatory surgical treatment center shall provide written documentation of one of the following:

- 1) A transfer agreement with a licensed hospital within approximately fifteen (15) minutes travel time of the facility.

- 2) A statement that the medical director of the facility has full admitting privileges at a licensed hospital within approximately fifteen (15) minutes travel time and that he/she will assume responsibility for all facility patients requiring such follow-up care.

- 3) A statement that each staff physician, dentist, or

podiatrist has admitting privileges in a licensed hospital within fifteen (15) minutes travel time of the facility.

e) ~~h~~ Written instructions shall be issued to all patients in accordance with the standards approved by the consulting committee of the ambulatory surgical treatment center and shall include the following:

- 1) Symptoms of complications associated with procedures performed.
- 2) Limitations and/or restrictions of activities of the patient.
- 3) Specific telephone number to be used by the patient at anytime should any complication or question arise.
- 4) A date for follow-up or return visit after the performance of the surgical procedure which shall be scheduled within six weeks.

f) ~~e~~ Patients shall be discharged only on the written signed order of a physician. The name, or relationship to the patient, of the person accompanying the patient upon discharge from the facility shall be noted in the patient's medical record.

g) Information on availability of family planning services shall be provided, when desired by the patient, to all patients undergoing a pregnancy termination procedure. When, in the physician's opinion, it is in the best interests of the patient and with the patient's consent, family planning services may be initiated prior to the discharge of the patient.

(Source: Amended at 14 Ill.Reg. _____, effective August 15, 1990)

**SUBPART G: LIMITED
PROCEDURE SPECIALTY CENTERS
~~ADDITIONAL REQUIREMENTS FOR FACILITIES~~
~~IN WHICH OBSTETRICAL/GYNECOLOGICAL~~
~~PROCEDURES ARE PERFORMED~~**

**Section 205.710 Pregnancy Termination Specialty Centers
Abortions**

~~Abortions shall be provided to the public with the same standards of safety, effectiveness, and regard for patients rights as any other health service.~~

a) A facility will be considered a pregnancy termination specialty center if it meets each of the following conditions:

- 1) Procedures performed at the facility are limited to procedures to terminate pregnancy performed within 18 weeks assessed gestational age (beginning on the first day of the last menstrual period), and other gynecologic procedures related to the termination of pregnancy. Assessed gestational age may be determined by patient history or by clinical assessment.
- 2) The center does not use general, epitural, or spinal anesthesia for any of the procedures performed. If intravenous sedation is used, mechanical ventilation devices and intubation equipment must be available on site.
- 3) The program narrative and policies of the facility are limited to the performance of procedures to ter-

minate pregnancy and other procedures related to the termination of pregnancy.

b) The following exceptions and modification of the requirements of this Part apply to pregnancy termination specialty centers.

Pregnancy termination specialty centers shall comply with each of the requirements of this Part, unless specifically excepted or modified by the provisions of this subsection.

1) The initial and renewal application need only include the name, address, and telephone number of all owners, administrators, and medical directors of the center [in lieu of compliance with Section 205.120(b)(5) through (7) and Section 205.125(b)(5) through (7)]. However, the other information required in these provisions shall be maintained at the center and be available for inspection by the Department. The information shall include the original or notarized copies of credentials of all licensed or certified personnel.

2) Compliance with Section 205.540(d) is not required, if the medical director or a physician practicing at the facility has a professional working relationship or agreement, maintained in writing at the facility and verifiable by the Department, with a physician who does have admitting or practice privileges at a licensed hospital within 15 minutes from the facility and who will assume responsibility for all facility patients requiring such follow-up care.

3) The administrative and public areas of the facility are not required to comply with Section 205.1350.

4) A separate examination room is not required; however, adequate space shall be provided to accommodate any equipment necessary for examination, to perform examinations safely, and to allow unobstructed ingress and egress to and from the examination area (in lieu of compliance with Section 205.1360(a)(1)).

5) Each room in which procedures to terminate pregnancy are performed shall be at least 120 square feet in size with a minimum dimension of at least 10 feet. Exceptions will be made when the center demonstrates that the room size is adequate to accommodate the equipment required for the procedures, to facilitate the performance of the procedures safely, and to protect the patients and staff in the event of fire or other emergency (in lieu of compliance with Section 205.1360(b)(1)).

6) A communications system between the control station and each procedure room is not required (in lieu of compliance with Section 205.1360(b)(2)).

7) Not less than three recovery beds or lounge chairs shall be required for each procedure room. However, if the facility's narrative program provides that no more than two procedures per hour will be performed per procedure room, then only two recovery beds or lounge chairs will be required for each procedure room. A minimum of three feet shall be provided between each recovery bed or lounge chair and an unobstructed passageway of a minimum of four feet shall be provided at one end of each bed or chair (in lieu of compliance with Section 205.1360(c)(2) and (c)(7)).

8) The recovery area is not required to include a

tion, or storage space for supplies and equipment [in lieu of compliance with Section 205.1360(c)(3)]. However, the facility shall provide for direct visual supervision of the recovery area for all patients.

9) A toilet for patient use must be in the recovery area, or in a location which does not require patients to enter public areas of other patient care areas in order to gain access from the recovery area. A gray diverter valve is not required on the toilet in the recovery area, if a means of fluid waste disposal is provided at another location within the center [in lieu of compliance with Sections 205.1360(c)(4) and 205.1370(f)].

10) A control station for the operating suite is not required [in lieu of compliance with Section 205.1370(a)].

11) A scrub station is not required outside the procedure room, if the procedure room contains a sink with handwashing capabilities [in lieu of compliance with Section 205.1370(d)].

12) A separate soiled workroom is not required; however, facilities shall be provided for closed clean storage which prevents contamination by soiled materials, and for storage and handling of soiled linens and other soiled materials. These procedures shall be described in the center's narrative program [in lieu of compliance with Section 205.1370(e) and (g)].

13) Anesthesia and medical gas storage facilities are not required [in lieu of compliance with Section 205.1370(h) and (i)].

14) A one-way traffic pattern through staff change areas is not required, but space shall be provided for any changing or gowning which is required by the specific procedures which are being performed in accordance with the center's narrative program [in lieu of compliance with Section 205.1370(k)].

15) A change area for patients is not required [in lieu of compliance with Section 205.1370(l)].

16) A separate janitor's closet for the surgical suite is not required, if the janitor's closet for the center is centrally located and contains space for the storage of supplies needed for cleaning both the surgical and non-surgical areas of the center [in lieu of compliance with Section 205.1370(n)].

17) A minimum corridor width of five feet and a minimum door width of three feet shall be provided for all corridors and for all doors which are accessible to the public or through which patients may need to be transported in an emergency [in lieu of compliance with Section 205.1400(a)(1), (b)(2), and (b)(3)].

18) The requirements of Section 205.1400(d) for flush thresholds and expansion joint covers do not apply.

19) Ceilings in procedure and recovery rooms must be cleanable, but are not required to be washable [in lieu of compliance with Section 205.1400(n)(1)].

20) The requirements for elevators in Section 205.1410(d)(1) do not apply.

21) Ventilation, air change, and air filter require-

ments do not apply; however, temperature shall be maintained in the facility between 68 and 80 degrees Fahrenheit [in lieu of compliance with Section 205.1540 and Table A].

22) The requirement for one duplex receptacle for each wall does not apply [in lieu of compliance with Section 205.1750(b)].

(Source: Section repealed, new Section adopted at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.720 Personnel (Repealed)

~~At least one registered professional nurse with postgraduate education or experience in obstetrical or gynecological nursing shall supervise and direct the nursing personnel and care of patients having obstetrical procedures.~~

~~AGENCY NOTE: Procedures involving the pregnant uterus are subject to particular complications and postoperative care requires a special knowledge on the part of nursing staff.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.730 General Patient Care (Repealed)

~~a) Examination~~

~~1) Prior to obstetrical procedures blood Rh factor shall be determined by a qualified laboratory technician for every patient.~~

~~2) The physician performing an abortion procedure~~

~~shall establish the diagnosis of pregnancy by appropriate clinical evaluation and testing prior to performing an abortion procedure.~~

~~3) Time shall be allowed between the initial examination and termination of pregnancy to permit the reporting to and reviewing of all laboratory tests with the patient by the facility physician.~~

~~b) Counseling~~

~~1) Counseling shall be provided following disclosure to the patient of the diagnosis of pregnancy, and prior to performance of any surgical procedure. It shall be done individually and in a room designated for such use which shall not be the procedure room.~~

~~2) All facilities shall provide orientation training for counselors and insure that each counselor is qualified to:~~

~~A) Counseling shall be done by a person qualified to:~~

~~i) discuss alternatives for dealing with a unwanted pregnancy;~~

~~ii) describe the procedures used in the facility;~~

~~iii) explain the risks and possible complications of each procedure;~~

~~iv) provide contraception information.~~

~~B) Demonstration of such counseling qualifi-~~

cations shall be required by the Department.

~~C) Documentation of orientation training shall be required by the Department.~~

~~D) Counselors shall have no financial interest in the patient's decision.~~

~~3) Counseling shall include a discussion of alternatives, description of the procedure to be performed, explanation of risks and possible complications. Contraceptive information may be provided postoperatively. Group counseling may be provided in addition to individual counseling. The patient's clinical record shall include documentation of the counseling received.~~

~~AGENCY NOTE: In the opinion of the Ambulatory Surgical Treatment Center Licensing Board, the patient should make a decision concerning the procedure in an atmosphere free from coercion. Consequently, the Board believes this is best accomplished in a room separate and apart from the procedure room. The Board believes that it is difficult to reach a truly voluntary decision while the patient is undressed and on the procedure table.~~

(Source: Repealed at 14 Ill.Reg. ____, effective August 15, 1990)

Section 205.740 Preoperative Requirements (Repealed)

~~Abortions may be performed in an ambulatory surgical treatment center on only those patients with gestation up to and including 12 weeks commencing with ovulation rather than computed on the basis of~~

~~the menstrual cycle, as determined by the physician, if the patient's medical condition permits. Abortions shall not be performed in an Ambulatory Surgical Treatment Center on those patients whose gestation exceeds 12 weeks.~~

(Source: Repealed at 14 Ill.Reg. ____, effective August 15, 1990)

Section 205.750 Postoperative Requirements (Repealed)

~~a) Each obstetrical/gynecological service shall provided Rh factor sensitization prophylaxis to all Rh negative patients according to standard medical procedures.~~

~~b) Information on availability of family planning services shall be provided, when desired by the patient. When, in the physician's opinion, it is in the best interest of the patient and with the patient's consent, family planning services may be initiated prior to the discharge of the patient.~~

(Source: Repealed at 14 Ill.Reg. ____, effective August 15, 1990)

Section 205.760 Reports (Repealed)

~~a) A report of each abortion procedure performed in an ambulatory surgical treatment center shall be made to the Department on forms provided by it. These reports shall be submitted not later than ten (10) days following the month in which the abortion was performed. Reports shall be submitted on procedures performed whether or not the patient was pregnant.~~

~~b) Reports shall not be filled out in such a manner or at such a time as to avoid accurate reporting of complication.~~

~~c) If the facility becomes aware of a complication following the submission of the original report, then a supplemental report shall be submitted to the Department.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.1380 Diagnostic Facilities

~~If the pre-admission evaluation tests are to be performed within the facility, the following services shall be provided:~~

a) Radiographic suite, if radiography is provided in the center, shall contain the following:

- 1) film processing area
- 2) viewing and administration area
- 3) film storage facilities
- 4) toilet room with handwashing facilities, directly accessible from each fluoroscopy room without entering the general corridor area.
- 5) dressing area with convenient access to toilets.

b) If laboratory testing is performed in the center which required a permit or license under the Department's rules Illinois Clinical Laboratories Code (77 Ill.Adm.Code 450), the laboratory area of the center ~~Laboratory suite~~ shall contain the following minimum facilities:

- 1) Laboratory work counter with sink and vacuum, and electric services.

2) Lavatory or counter sink equipped for handwashing.

3) Storage cabinet or closet for any necessary laboratory supplies and equipment. This storage area may be combined with other storage areas in the center.

~~4) Specimen collection facilities equipped with a toilet and lavatory.~~

4) 5) Blood collection facilities shall have space for a chair and work counter.

(Source: Amended at 14 Ill.Reg. ____, effective August 15, 1990)

